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No. 85-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT

GLENN M. FELDMAN
ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
1815 H Street, N.W., Suite 801
Washington, D.C. 20006
(202) 331-8690
Attorneys for Appellee
Cabazon Band of Mission Indians

BARBARA E. KARSHMER,
A Professional Corporation
ALEXANDER & KARSHMER
1950 Addison Street, Suite 109
Berkeley, CA 94704
(415) 841-5056
Attorneys for Appellee
Morongo Band of Mission Indians

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a state law and a local ordinance regulating the operation of bingo games can be applied to prevent federally-recognized Indian tribal governments from conducting bingo games on their reservations, where such games are sanctioned by the Department of the Interior and provide the sole source of revenue and the main source of employment for the tribes?

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The Cabazon and Morongo Bands of Mission Indians, appellees herein, respectfully move to dismiss this appeal on the grounds that it is not within the jurisdiction of the Court under 28 U.S.C. § 1254(2) or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit on the grounds that the decision below was correct and the question presented is so unsubstantial as to warrant no further review.

If the Court determines that it lacks appellate jurisdiction in this case and treats the appellants' jurisdictional statement as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, appellees request that this motion be considered a brief in opposition to such petition.

STATEMENT OF THE CASE

The Morongo Band of Mission Indians and the Cabazon Band of Mission Indians are both federally-recognized Indian tribes having government-to-government relationships with the United States. Their reservations consist of 32,000 acres and 1,700 acres of desert land, respectively, which are held in trust for the tribes by the United States. The reservations are located in Riverside County, California. Neither reservation has any known natural resources (*e.g.*, timber, fish, wildlife, oil or coal) which could be used to generate revenue for the operation of their tribal governments or for the provision of services to their members. Both tribes conduct tribal bingo games and the Cabazon Band also operates a card room,[1] which serve as the sole source of funds for their tribal governments and for the provision of services for their members.

Prior to the creation of its tribal bingo enterprise, the unemployment rate for Morongo's nearly 800 members was

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[1] The Cabazon card room permits only the playing of three specific games which are lawful in the State of California. It is identical in nature to more than 400 similar establishments scattered throughout the state.

64% and most members were poverty stricken. Because less than one square mile of the reservation was suitable for economic development, the Morongo Band authorized the establishment of a tribal bingo enterprise to generate revenues for its tribal government and to provide for the health, education, and welfare of its members. The bingo enterprise is regulated by the tribe through its tribal bingo ordinance, and its management contract is approved by the Secretary of the Interior pursuant to 25 U.S.C. § 81. Nearly ninety members are employed in the tribal bingo enterprise, and the tribe takes an active role in overseeing and controlling the bingo operations.

The Cabazon Band is governed by Articles of Association which have been approved by the Secretary of the Interior, and it has adopted tribal ordinances authorizing and regulating its tribal bingo enterprise and card club. In addition to providing tribal revenues, the enterprises provide employment opportunities for all tribal members that need jobs, particularly those with the fewest job skills and the least chance for employment elsewhere.

These tribal enterprises have become especially critical to the continued existence of these tribes as federal funds for Indian programs have been sharply reduced. As the House Committee on Interior and Insular Affairs stated in its recent report on H.R. 1920, the Indian Gaming Regulatory Act:

> many tribes, faced with severe cuts in Federal program aid supporting tribal government and tribal programs and lacking a tax base or other source of governmental revenue, have turned to gaming as a source of such revenue. In this respect, they are not unlike many state governments who have turned to State lotteries or other forms of gaming to supplement their tax revenue.

H.R. Rep. No. 488, 99th Cong., 2d Sess. (March 10, 1986) 12.[2] And, as Mr. Udall, the Committee Chairman, stated in his Supplemental Views on H.R. 1920:

> No segment of our population has been more devastated by reductions in Federal programs. Gramm-Rudman, for the tribes, is not a matter of cutting the fat or even losing a little flesh. For them, it is literally a matter of life and death. It is little wonder that they have so desparately turned to gaming for revenue. It is hard to understand those who would deny them this small source of hope.

Appendix at 53a. The funds from these tribal enterprises are being used by the tribes to improve living conditions on their reservations; to establish, equip and train a tribal fire department; to repair and maintain the reservation water system; to build a center and establish programs for senior citizens; to establish pre-school and day care programs for the children; to provide health care services; to establish a reservation security force; to fund the extension of basic utility services to the reservation; to pay for traditional funeral and mourning ceremony expenses and the upkeep of the tribal cemetery; and to establish a tribal court system. Most of these activities would previously have been funded by the Federal Government.

At issue in this case is the right of these tribal governments to permit, regulate and operate their tribal bingo games under tribal law and ordinance, free from the regulatory jurisdiction of the State and County governments. It must be noted that California law regulates only the operators—here the Cabazon and Morongo Bands—of a

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[2] As discussed more fully below, at pages 8-11, on April 21, 1986 the House of Representatives passed H.R. 1920, the Indian Gaming Regulatory Act, and referred it to the Senate. The House Report on H.R. 1920 is attached hereto as Appendix 1.

bingo enterprise, not the playing of or participation in the game. Members of the public are entirely free to participate in whatever games they choose, as frequently as they desire and to whatever degree they wish. In fact, California law requires that "all bingo games shall be open to the public," not just to the members of the group sponsoring the games. Calif. Penal Code § 326.5 (g). While California law regulates some aspects of bingo,[3] California law does not regulate the number of games which an eligible organization may operate, the number of games which any participant may play, the amount of money a participant may spend or the admission prices to participate, the total receipts or expenditures of the operation, the number of organizations eligible to conduct bingo games, or the advertising of bingo games to the general public.

Under California state law, a broad range of organizations can sponsor bingo. *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1189 (9th Cir. 1982), *cert. denied* 461 U.S. 929 (1983). Indian tribes, however, have been excluded from this list. Therefore, if California's bingo laws applied on the reservations, these tribes would be prevented from operating bingo games, and would be wholly deprived of the governmental revenues and employment opportunities that these games provide.

As will be discussed more fully below, the only interest asserted by the appellants herein is to prevent the potential for the intrusion of organized crime. However, the court of appeals found that there was no evidence of or-

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[3] State law limits bingo prizes to $250 per game. The prizes awarded at the Cabazon and Morongo games sometimes exceed this limit. However, the magnitude of these prizes should not be exaggerated. The evidence on the record below shows that the *average* prize for all bingo games on the Cabazon Reservation during a representative four month period in 1984 was $184.89, well *below* the state limit. Supplemental Excerpt of Record at 41.

ganized crime on these reservations, and the U.S. House of Representatives made the same finding nationally in its report on H.R. 1920.

SUMMARY OF ARGUMENT

On three previous occasions, this Court has declined the opportunity to address the right of Indian tribes to sponsor bingo games on their reservations.[4] This case presents the same question. For the reasons discussed below, we believe that it is both unnecessary and inappropriate for the Court to grant plenary review in this case.

First, the appeal should be dismissed because the case is not within the Court's appellate jurisdiction under 28 U.S.C. § 1254(2).

In addition, Congress has studied this matter extensively and is currently in the process of enacting comprehensive legislation dealing with tribal gaming activities. Under these circumstances, we believe that the Court should decline to hear this case so as to allow Congress the opportunity to exercise its oversight and legislative functions in the field of Indian affairs.

Finally, the decision of the court of appeals is correct both as to the method of analysis used and the result reached, is consistent with every federal court decision on the subject, and presents no substantial federal question requiring further consideration by this Court.

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[4] *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) *cert. denied*, 455 U.S. 1020 (1982); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed* 464 U.S. 923 (1983).

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THE COURT'S APPELLATE JURISDICTION UNDER 28 U.S.C. § 1254(2)

Because the court of appeals did not invalidate any state law, consideration of this case as an appeal under 28 U.S.C. § 1254(2) is clearly improper. An examination of the court of appeal's decision demonstrates that it merely held that the State and County may not apply their laws on the appellees' Indian reservations because application of these laws would infringe upon the right of the tribes to make their own laws and be governed by them. Appellants' Appendix at A-11.[5] In its recent consideration of appeals under § 1254(2), this Court reiterated that it has

> consistently distinguished between those cases in which the state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute.

Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 104 S. Ct. 615, 620 (1984). As did *Silkwood*, this case falls into the latter category. The court below did not purport to rule on the constitutionality of any California statute, did not mention any specific California statute, and the parties did not contest or defend the constitutionality of any California statute in their briefs. Thus, California laws were left untouched, as were the Oklahoma laws in *Silkwood* where this Court found that the appeal was not within its § 1254(2) appellate jurisdiction for these very reasons. *Id.* at 621. *See also, Perry Education Ass'n. v. Perry Local Educators Ass'n.*, 460 U.S. 37, 42-43 (1983).

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[5] References in this brief to "Appellants' Appendix" are to Appendix 1 of the Appellants' Jurisdictional Statement, where the court of appeals Amended Decision is reprinted.

The cases cited by appellants in support of their claim that this Court has jurisdiction under 28 U.S.C. § 1254(2) are inapposite. The first three cases cited involve appeals of decisions specifically holding certain state laws or local ordinances unconstitutional either on their faces or as applied. *See Dutton v. Evans*, 400 U.S. 74 (1970); *Watson v. Employers Liability Assurance Corp.*, 384 U.S. 66 (1954); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). The final three cases involve appeals under 28 U.S.C. 1257, which does not apply because this action is not an appeal from the highest court of the State as were those cases. *See McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960). Moreover, all of the cases pre-date the *Silkwood* case, which clarifies that this Court does not have jurisdiction under § 1254(2) because no state law has been struck down or invalidated on constitutional or other grounds.

Statutes authorizing appellate jurisdiction, such as § 1254(2), are to be strictly construed. *Perry, supra*, 460 U.S. at 43; *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970). Therefore, the appeal should be dismissed.

II. CONGRESS HAS STUDIED THIS ISSUE AND IS MOVING RAPIDLY TO ENACT LEGISLATION REAFFIRMING THE RIGHT OF TRIBES TO OPERATE BINGO FREE FROM STATE JURISDICTION

This Court has recognized that Congress is better equipped than the judiciary to investigate and study matters involving difficult policy considerations, and that legislative rather than judicial solutions are often preferable in such cases. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 513 (1983); *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980).

Congress has long been recognized as exercising "plenary powers" over Indian affairs. Over the years, Congress has exercised this authority by enacting a broad range of legislation promoting tribal self-government and reservation economic development. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35, and n.17 (1983) (citing numerous federal statutes supporting these goals); *Kerr-McGee Corp. v. Navajo Tribe*, ___ U.S. ___, 105 S. Ct. 1900, 1904 (1985). Congress is now moving rapidly to enact legislation that will regulate tribal gaming activities in general, and promote tribal bingo games in particular.

Representative Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, Representative John McCain (R- Ariz.) and several co-sponsors, introduced H.R. 1920, the Indian Gaming Regulatory Act, on April 2, 1985. 131 Cong. Rec. E1315 (daily ed., April 3, 1985).[6] The House Interior Committee conducted three days of hearings on this and related bills during June, September and November, 1985, including a day of field hearings in California, and, on December 11, 1985, favorably reported the bill, as amended. H.R. 1920, with a further amendment, was passed by the House of Representatives on April 21, 1986 by unanimous consent and sent to the Senate. 131 Cong. Rec. H2012 *et seq.* (daily ed. April 21, 1986). Hearings before the Senate Select Committee on Indian Affairs on H.R. 1920 and S. 902 are presently scheduled for June 17, 1986.

Among the principal objectives of H.R. 1920 is the clearly expressed intention to protect tribal bingo games from state regulation. In the statement of congressional findings in H.R. 1920, it is declared that:

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[6] Companion legislation, S. 902, was introduced in the Senate on April 4, 1985 by Senator DeConcini. 131 Cong. Rec. S4124 (daily ed., April 4, 1985). Senate Committee hearings on this bill were held on June 26, 1985.

> (2) Indian tribes have the exclusive right to regulate gaming activity on Indian lands which is not specifically prohibited by Federal law and which is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity;
>
> * * *
>
> (5) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments; and
>
> (6) tribal operation and licensing of gaming activities is a legitimate means of generating revenues.

Appendix at 2a.[7]

In its consideration of H.R. 1920, the House Interior Committee heard from witnesses representing all sides of the Indian bingo question, including the parties in this case. H.R. 1920 represents the considered judgment of the House of Representatives as to the proper balance between the respective rights and interests of the Federal Government, Indian tribes, and the states. As the House Report states:

> H.R. 1920, as amended, is an attempt to meet the concerns of all parties while preserving the

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[7] Although H.R. 1920 has only been passed by the House at this time, in a recent case this Court quoted extensively from the factual record in a Senate Committee Report on legislation that was never enacted. *Walters v. National Association of Radiation Survivors*, ___ U.S. ___, 105 S. Ct. 3180, 3190, n.10 (1985). While the Court reserved judgment on the degree of deference to be accorded to such factual determinations, *id.* at 3194-95, n.12, it is apparent from the opinion that the Court was guided, at least in part, by these congressional findings. We believe that the Court should be similarly guided here, where the findings are based on extensive Committee hearings, the legislation has passed the House, and Senate Committee hearings are pending.

> integrity and rights of tribes to be governed by by their own laws and protecting the right of tribes to generate necessary revenue to support tribal government and programs.

Appendix at 27a. Similar sentiments were expressed at the time that the House passed the legislation. For example, Representative McCain (R-Ariz.), a co-sponsor and a member of the House Interior Committee, stated:

> I rise in support of H.R. 1920, the Indian Gaming Regulatory Act. . . .
>
> * * *
>
> Traditionally, states and Indian tribes have been adversaries, as our committee hearings clearly demonstrated. State witnesses wanted state jurisdiction, regulation, enforcement and taxation. However, no state witness testified that the State had a responsibility to Indian tribes for their health, welfare or economic development.

131 Cong. Rec. H. 2021 (daily ed., April 21, 1986) (statement of Representative McCain).

In addition to this legislative initiative, the Secretary of the Interior has already exercised his regulatory authority over tribal bingo activities. On April 7, 1986, the Assistant Secretary for Indian Affairs distributed to every tribal government in the United States detailed guidelines requiring departmental review and approval of tribal bingo management contracts.[8] A copy of the letter and Interior Department memorandum is attached hereto as Appendix 2. These guidelines require, among other things, an FBI

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[8] These guidelines replace and strengthen an earlier version which had been promulgated on July 20, 1984.

investigation and background check on all non-Indian management personnel, for the express purpose of prohibiting anyone with a criminal background from participating in any tribal bingo enterprise. Appendix at 66a-67a, ¶ 12.

As these facts indicate, both Congress and the Department of the Interior are asserting their oversight responsibilities with respect to tribal bingo. The decision below is consistent with these legislative and administrative actions, obviating the need for the Court to grant plenary consideration in this case.

III. THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION THAT WARRANTS PLENARY REVIEW

A. The Case Presents No Conflicts And Is Consistent With All Federal Court Decisions

Every federal court that has addressed the issue of tribal bingo has upheld the right of tribes to operate bingo games free from state jurisdiction. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group of the Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc., 1981); *State of Washington v. Hatch*, C-83-1518R (W.D. Wash., Aug. 14, 1984), *appeal dismissed* (9th Cir., Feb. 21, 1985); *Mashantucket Pequot Tribe v. McGuigan*, Civil No. H-85-210 (D. Conn. Jan. 9, 1986); *Indian Country U.S.A. v. State of Oklahoma*, No. 85-C643-E (N.D. Ok., April 24, 1986). The decision below is consistent with this unbroken line of federal authority and presents no conflict requiring this Court's review.

This Court denied petitions for certiorari in the *Barona* and *Seminole* cases, above, which raised identical questions of law and fact. In addition, this Court dismissed an appeal "for want of a substantial federal question" in *Penobscot Nation v. Stilphen*, (Me.) 461 A.2d 478, *appeal dismissed*,

464 U.S. 923 (1983).[9] Appellees contend, therefore, that this is not a case in which a substantial federal question deserving of this Court's attention is present. This Court concluded that these same issues presented in *Seminole*, *Barona*, and *Penobscot* did not warrant plenary consideration, and appellees believe that nothing has changed either legally or factually to create a need for review by the Court at this time.

Appellants urge this Court to consider this case because an alleged "conflict exists among lower courts concerning this question." Under Rule 17 of this Court, a conflict between the decision of a federal court of appeals and that of the highest court of the state in which the case arose may serve as the grounds for a petition for certiorari to be granted.[10] There is no such conflict in the case presently before the Court, however. Although the California Supreme Court has not ruled on the specific subject of tribal bingo, it has cited with approval and followed the rationale utilized by the Ninth Circuit Court of Appeals in *Barona Group v. Duffy* (and consequently in this case) as to the limits of the state's jurisdiction under P.L. 280. *People, ex rel. Dept. of Transportation v. Naegele*, 211 Cal. Rptr. 247, 254 (1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1260 (1986).

To create an illusion of conflict where none exists, appellants look to the decisions of the Supreme Courts of Maine and Oklahoma in the cases of *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S.

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[9] Although the Maine Supreme Court reached an opposite result, it did so on the basis of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 and Maine legislation implementing that Act. That court recognized specifically that the relationship between Indians in Maine and the State was unlike that which exists anywhere else in the United States and specifically distinguished the *Seminole* and *Barona* cases from its holding.

[10] *See, e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974); *Ward v. Illinois*, 431 U.S. 767, 770-771 (1977).

923 (1983); and *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Ok. 1985). Obviously, neither court is the highest court of the State of California; neither case concerns the applicability of California or Riverside County bingo laws; neither cases arises in a P.L. 280 state; and both cases involve states whose relationships with tribes are very different from those of other states in this country. According to the Maine Supreme Court, the relationship between Indians and the State of Maine is "unlike that which exists anywhere else in the United States," 461 A.2d at 488, and "different from the relationship of Indians in other states to the state and federal governments," *id.* at 489, as a result of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735. *See also* footnote 9, *supra.* Similarly, Felix Cohen, the most noted commentator on Federal Indian law, devotes an entire section of his *Handbook of Federal Indian Law* to a discussion of the jurisdictional, historical, and legal differences between Oklahoma tribes and those in other areas, classifying Oklahoma Indians as a "Special Group" along with Alaskan and Hawaiian Natives.[11]

It should also be noted that the Oklahoma Supreme Court did not enter a final judgment holding that the state has jurisdiction over tribal bingo games; it specifically reserved judgment on that ultimate question and remanded the case back to the trial court for an evidentiary hearing on the balancing of interests. 711 P.2d at 78, 92. But even in taking this limited action, the court's reasoning is seriously flawed in that it fails to perceive the difference between sovereignty and sovereign immunity, cites cases that have been overturned, and generally takes an unprecedented approach to jurisdiction. The court's analysis is so unpersuasive, in fact, that the U.S. District Court for the Northern District of Oklahoma has recently ruled

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[11] Cohen *Handbook of Federal Indian Law*, 1982 Ed., Michie Bobbs-Merrill, pages 770-797.

in favor of the Creek Indian Nation, and against the State of Oklahoma, in an Indian bingo case, while largely ignoring the reasoning employed by the state court. *Indian Country U.S.A. v. State of Oklahoma, supra.*

Thus, there is absolute unanimity among the many federal district and circuit courts that have considered the tribal bingo question, and the Supreme Court of California has expressly adopted the holdings in these cases as to the limits of the state's jurisdiction under P.L. 280. There is, therefore, no conflict among the lower courts on this question requiring review by this Court.

B. The Decisions in *Rice* and *Bryan* Are Consistent With Each Other And With the Decision in This Case

The appellants claim that it is necessary to review this case because of alleged "uncertainties" in the law caused by earlier decisions of this Court. However, the decisions in *Rice v. Rehner*, 463 U.S. 713 (1983) and *Bryan v. Itasca County*, 426 U.S. 373 (1976) do not conflict with each other and cause no uncertainty or confusion except in the minds of those who would misread them, as do appellants herein.

Bryan v. Itasca County is the seminal case interpreting Public Law 83-280, 67 Stat. 588 (1953) a statute not in question or reviewed in *Rice*. The Court in *Bryan* reviewed the language and legislative history of P.L. 280 and concluded that P.L. 280 granted the states criminal jurisdiction over the reservation and civil jurisdiction in State courts to adjudicate private civil causes of action involving Indians. The Court held that beyond these specific grants of authority, the law with regard to reservation Indians remained unchanged. 426 U.S. at 391.[12] And, perhaps most

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[12] The appellants incorrectly claim that P.L. 280 was generally intended to broaden state jurisdiction over Indians. Based on this Court's review of the legislative history, there is nothing to lend support to that conclusion. This Court itself noted that there would be a "devastating impact on tribal governments" were P.L. 280 interpreted to

important, *Bryan* held that "there is notably absent any conferral of state jurisdiction over the tribes themselves." 426 U.S. at 391. It is just such jurisdiction which the state seeks to assert in the instant case, namely: jurisdiction to prevent the tribes themselves from operating their tribal bingo games.

Moreover, it was in the *Bryan* case that this Court concluded that nothing in P.L. 280 was intended to subject reservation Indians to the "full panoply of civil regulatory powers . . . of state and local governments" for to do so would turn the tribes into little more than "private, voluntary organizations." *Bryan*, 426 U.S. at 389.[13]

In contrast, *Rice v. Rehner* involved the interpretation of 18 U.S.C. § 1161, a statute not involved in the present case and far different from P.L. 280. The appellants claim that these two cases are confusing on the basis of footnote 18 in *Rice* , which states that this Court is reluctant to make a distinction between "substantive" and "regulatory" laws in the "absence of a context that might possibly require it." 426 U.S. at 734, n.18. The Court immediately continues the same footnote by distinguishing the *Bryan* case, to point out that *Bryan* is the type of case which calls for such distinctions to be made.[14] Reviewing *Bryan*,

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give state and local governments "general civil regulatory control over reservation Indians," 426 U.S. at 388, n.14, citing *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). The *Santa Rosa* court had found that such a result "would significantly undermine, if not destroy such tribal self-government." 532 F.2d at 662.

[13] The appellants argue that the distinction between civil regulatory and criminal laws was dictum because they claim that the tax laws involved in *Bryan* were not regulatory. Contrary to their claim, this Court specifically refers, at 426 U.S. 389, to "civil regulatory powers, including taxation," meaning that taxation was one of the civil regulatory powers over which the states did not acquire jurisdiction.

[14] The footnote says "*Cf. Bryan* . . ." The abbreviation "cf." commonly means "compare," indicating that a distinction is to be made.

which was cited with approval in the *Rice* decision, one sees that the distinction drawn between "civil regulatory" law and "criminal" law therein is significantly different from the type of distinction viewed with disfavor in footnote 18. In *Bryan*, the Court was confronted with interpreting a Congressional enactment, P.L. 280, which on its face divided laws into criminal and civil categories. This Court concluded from the legislative history that Congress did not intend to subject Indians to the general civil regulatory laws of a state, but rather intended only that the judicial forums of the state would be open to reservation Indians and the state decisional laws would apply to those controversies.

Clearly, this situation is far different from the distinction between substantive and procedural laws which was urged in *Rice* and which the Court rejected because there was no legislative language or history to support such an interpretation. In a long line of cases stretching over the past decade, the various circuit courts of appeals have utilized this civil regulatory/criminal distinction and this Court has never found it necessary to review or overturn their decisions. *See, e.g., Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

Even the House of Representatives endorsed the approach taken by the Ninth Circuit in the case presently before this Court. In structuring its legislation, it cited the decision with approval, and utilized the same criminal/civil regulatory approach approved in this case. Significantly, the House Committee Report also stated that *Rice* was not adopting a new doctrine by which to measure the extent of state power in Indian country and was not creating a new theory of Indian sovereignty. Appendix at 26a. Both are indications that Congress itself agrees that

P.L. 280 was intended to apply only criminal prohibitory laws to Indian reservations, not state laws like those at issue here which permit and regulate the playing of bingo. Thus, it is apparent that there is no conflict with respect to federal court decisions concerning tribal authority to operate bingo games and *Bryan*, on the one hand, and *Rice v. Rehner* on the other.

C. California's Public Policy With Respect to Bingo Does Not Raise a Substantial Federal Question Warranting Further Review

In holding that neither P.L. 280 nor the Organized Crime Control Act, 18 U.S.C. § 1955, grants jurisdiction to the State or County to apply their bingo laws on the reservation, the court of appeals found that bingo was not contrary to the public policy of California. Appellants' Appendix at A-4-6. In *Barona*, the court of appeals had recognized that California permits an almost unlimited variety of groups and organizations to sponsor bingo,[15] and that the uses of tribal bingo proceeds were "as worthy as the other charitable purposes to which bingo proceeds are lawfully authorized under the California statute." 694 F.2d at 1190.[16] In reliance on *Barona* and the 5th Circuit's earlier decision in *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) *cert. denied*, 455 U.S. 1020 (1982), the court below held that bingo was not violative of California's public policy.

The State's more general argument that commercial gambling is contrary to California's public policy also rings somewhat hollow in light of the fact that Californians are

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[15] Under California law, fraternal organizations, senior citizens groups, mobile home associations, labor and agricultural groups, recreational clubs, real estate boards and a host of entities other than Indian tribes may conduct bingo games.

[16] As in the *Barona* case, both the Cabazon and Morongo tribal bingo ordinances require that bingo proceeds be used to promote the health, education and general welfare of the tribes and their members.

betting *$8.6 million per day* on the new State Lottery; that Californians bet more than *$2 billion* in 1982 on horse races; and that there are over 400 public poker casinos throughout the state where card players can win or lose unlimited amounts of money.[17]

The question of California's public policy with respect to bingo is, of course, a matter requiring interpretation and application of state law. On such questions, this Court has historically shown substantial deference to the decisions of district and circuit court judges, "who are familiar with the intricacies and trends of local law and practice." *Bishop v. Wood*, 426 U.S. 341, 346 and n.10 (1975); *see also, United States v. Varig Airlines*, 467 U.S. 797, 815, n.12 (1984); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181, n.11 (1979). While this Court may, on occasion, reverse lower court interpretations of state law, it does so only when the decision below is "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), or "unreasonable." *Propper v. Clark*, 337 U.S. 472, 487 (1949).

In this instance, the decision below was both correct and reasonable. Bingo is permitted and widely played throughout California. The State's effort to distinguish tribal bingo (which it erroneously characterizes as "commercial gambling") from other bingo games (which it characterizes as "charitable" bingo) is both misleading and unwarranted. The State quotes briefly from the Report of the National Gambling Review Commission to the effect that bingo can be abused by unscrupulous operators. Jurisdictional Statement at 18. But the State fails to note that the same Report expressly *rejected* a functional distinction between "commercial" and "charitable" bingo:

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[17] The city of Gardena, California proudly bills itself as "The Poker Capital of the World." Supplemental Excerpt of Record at 7.

> The Commission perceives little difference between "charitable bingo" and commercial bingo. Charitable bingo . . . is sponsored by statutorily sanctioned organizations such as churches and service clubs. It is operated, however, like a commercial operation. . . . The Commission's survey has found that people play charitable bingo for the same reasons they might participate in commercial bingo: Bingo provides entertainment and a chance to make money. The charitable aspects of the game are relatively unimportant.

Excerpt of Record at 183-84.

Two different panels of the Ninth Circuit have now concluded that tribal bingo games are not contrary to California's public policy. This determination, based on state law considerations, is reasonable and not a significant federal question which warrants plenary review by this Court.

IV. THE COURT OF APPEALS CONDUCTED A PARTICULARIZED INQUIRY AND REACHED THE CORRECT RESULT

Like the other federal courts that have sanctioned tribal bingo games, the court below concluded that neither P.L. 280 nor the Organized Crime Control Act authorized the exercise of state jurisdiction over these tribal activities. In addition, however, the Ninth Circuit went even further in the present case and conducted a "particularized inquiry" into the respective federal, tribal and state interests involved. In so doing, the Court was applying an accepted method of analysis, although one which is usually used when the regulation of non-Indians is at issue. *See, e.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983).

Under this analysis, the Court has repeatedly recognized two independent barriers to state jurisdiction over activ-

ities on Indian reservations: preemption by federal law or infringement on the right of tribal self-government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142. After carefully analyzing and balancing the respective interests at issue, the court below concluded that the federal and tribal interests clearly outweighed the state interest, and that assertion of state and local jurisdiction over tribally conducted bingo games would impermissibly infringe on the tribes' right of self-government. Appellants' Appendix at A-11.

The only interest asserted by the State of California in this case is in protecting against "the *potential* for intrusion of organized crime" into these games. Appellants' Appendix at A-10 (emphasis in original). As the Ninth Circuit correctly found, there is no evidence whatsoever that organized crime exists on these Indian reservations. *Id.* at A-8. In fact, the State and County stipulated to this fact in the district court. After extensive hearings, including field hearings in California, the House Interior Committee likewise found no evidence of organized crime involvement in tribal bingo games. Appendix at 24a-25a. The state also fails to recognize that both the tribes and the Federal Government share a substantial interest in keeping the tribal bingo games free from criminal involvement.

The appellants claim, without any basis whatsoever, that the tribes are incapable of controlling activities on their reservations.[18] The Morongo Band terminated one bingo operation with which it was dissatisfied and successfully brought action in federal court to terminate another bingo operating in violation of its tribal bingo ordinance. The Cabazon Band has a tribal security force and a tribal court through which it controls activities on its reservation. Thus,

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[18] The Court has recently rejected a similar argument in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 342, n.27 (1983).

both tribes have the capability of controlling activities within their jurisdiction.

In addition, the Federal Government has a substantial array of resources which it can bring to bear against illegal gambling on Indian reservations. *See, e.g.*, 15 U.S.C. § 1171-75, 18 U.S.C. § 1955. The United States has shown no reluctance to use them in appropriate cases. *See United States v. Farris*, 624 F.2d 890 (9th Cir.) *cert. denied*, 419 U.S. 1111 (1980); *United States v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 364 F. Supp. 192 (D. Mont. 1973). Therefore, the lower court's holding that the state's interest, while legitimate, did not outweigh the countervailing federal and tribal interests is plainly supported by the applicable legal principles and the particular facts of this case.

A. The Federal Interests Involved Here Weigh Heavily In Support of the Tribe's Position

In balancing the federal, tribal and state interests involved here, the court of appeals correctly placed substantial weight on the fact that the United States Department of the Interior strongly supports tribal bingo as a legitimate means of raising tribal revenues and providing reservation employment opportunities. Appellants' Appendix at A-8-9. Within the Executive Branch, the Interior Department and its personnel are statutorily charged with the responsibility for formulating Indian policy and managing Indian affairs. *See, e.g.*, 25 U.S.C. § 1, 1a, 2, 13. Therefore, the views of the Department of the Interior in such matters are entitled to great weight and substantial deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

In finding that the interests of the federal government support the tribes' position in this case, the court of appeals noted both the recent federal statutes that promote reservation economic development, Appellants' Appendix at A-8, and President Reagan's Indian Policy Statement of January 24, 1983, calling on tribes to "reduce their de-

pendence on federal funds by providing a greater percentage of the cost of their self-government." *Id*; *see Kerr-McGee Corp. v. Navajo Tribe*, ___ U.S. ___, 105 S. Ct. 1900, 1904 (1985). Beyond these, the court of appeals also had before it, and quoted from, a March 2, 1983 directive from the Assistant Secretary of the Interior which stated that efforts to subject tribal bingo to state jurisdiction would be "strongly opposed" as inconsistent with federal Indian policy, and stating, instead, that these tribal bingo ventures should be "protected and enhanced" by the federal government. Appellants' Appendix at A-8-9. In addition, the Director of Indian Services, Bureau of Indian Affairs, had submitted an affidavit on behalf of the Cabazon and Morongo Bands in the district court, which stated quite clearly that tribal bingo games were an approved means by which tribes could generate necessary revenues. *Id.* at A-9. The affidavit continued:

> We recognize that the limitations of federal funding for tribal governments has been the impetus for many tribes to seek alternative sources of the revenue they need in order to provide governmental services to their people. A number of tribes have turned to bingo enterprises to supply that revenue just as many states have instituted state-run lotteries for the same purpose.[19]

Declaration of Theodore Krenzke, Excerpt of Record at 525.

The Interior Department's position on this question has remained consistent. In testimony before the House Interior Committee on November 14, 1985 concerning H.R. 1920, the Interior Department witness stated:

> Indian reservation gambling provides economic benefit to many of the tribes involved, especially

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[19] California is, of course, one such state.

> those with no valuable natural resources or other significant sources of income.
>
> * * *
>
> We oppose State control over bingo because it would drive Indian bingo out of business by subjecting it to the days, hours, prize and other restrictions of the States.
>
> * * *
>
> We believe that the law enforcement risks involved with bingo are manageable and do not warrant State regulation.

Testimony of Marian Blank Horn, Principal Deputy Solicitor, Department of the Interior, November 14, 1985.[20]

The court of appeals, therefore, was certainly correct in holding that the federal interest in promoting tribal bingo weighs heavily in support of the tribes' position in this case and against state jurisdiction over tribal bingo games.

B. The Tribes Are Not "Marketing An Exemption"

The Court below also carefully considered and then rejected the appellants' argument that the tribes' interest in generating revenues for governmental programs and services from bingo is weak because the tribes are allegedly "marketing an exemption" from state law. In rejecting this contention, the court of appeals applied the teachings of this Court to the particular facts of this case, and reached the appropriate result.

In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), the Court had permitted

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[20] The United States Department of Justice also testified before the House Interior Committee on November 14, 1985, to state that "an Indian gambling policy . . . has been agreed upon by the Department of the Interior and Justice." A key element of that policy was that tribal bingo activities would continue to be regulated by the Federal Government, and not subject to state jurisdiction.

the State of Washington to impose a concurrent state cigarette tax, in addition to the tribal tax, on cigarettes sold to non-tribal members. In assessing the respective revenue interests of the tribe and the state, the Court recognized that while both were legitimate,

> [the tribal] interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services .... [The state's] interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 156-57. In *Colville*, the Court found the tribal revenue interest weak because the activity involved "off-reservation value."

In the present case, however, quite the opposite is true. As the court below noted, even the appellants in this case concede that "the revenues here are derived from value generated by on-reservation activities. . . . Appellants' Brief at 28, n.11." Appellants' Appendix at A-10. In addition, the appellants here are not asserting any revenue interest at all in the tribal bingo games. As a result, the Court below was correct in finding that the tribes' revenue interests in these activities were strong, and entitled to substantial weight in its "particularized inquiry" analysis.

The situation presented by this case is far more analogous to *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) than to *Colville*. In *New Mexico*, the Court recognized that concurrent state regulatory jurisdiction would effectively nullify tribal jurisdiction and would "threaten Congress' overriding objective of encouraging tribal self-government and economic development." *Id.* at 341. This concern is even more compelling here, given the position of both Congress and the Department of the Interior that tribal bingo is an important and legitimate

means by which tribes must replace dwindling federal funds, and the fact that the State would not merely regulate but entirely prohibit such games.

In sum, the tribes here are providing on-reservation recreational activities, to which they have made substantial contributions of resources and services, and from which they derive necessary tribal revenues and provide on-reservation employment opportunities. The state has no countervailing revenue interest in the activities, and provides no on-reservation services to the bingo players that would justify concurrent regulatory authority. *New Mexico*, 462 U.S. at 341. As a result, the present case is likewise "far removed" *id.*, from the *Colville* situation and the court of appeals was correct in according substantial weight to the tribes' revenue interests in the tribal bingo games.

C. The Tribes Have a Tradition Of Self-Government With Respect to Gaming

The appellants argue that the court of appeals failed to properly analyze the question of "tribal tradition" with respect to the activities at issue here. They contend that there is no tribal "tradition" of commercial gaming on these reservations, and that absent such a tradition the State is authorized to regulate these tribal activities. The State's argument is wrong both as a matter of fact and of law.

According to Dr. Lowell Bean, the leading anthropological expert on Câhuilla Indians and a declarant witness in this case, the Indians of the Morongo and Cabazon tribes:

> have engaged in gambling for both public and private benefit, provided time and space under the direction and control of tribal leaders for gambling purposes, and have encouraged Indians of other tribes and in historic times, persons of other cultures and races . . . to participate in gambling endeavors.

* * *

> Traditional gambling techniques have continued among these people from time immemorial until the present. Gambling has at no time in the history of the Cahuilla peoples ceased as a significant activity, including today.

* * *

> [Tribal gamblers] received an extraordinary amount of money for these activities and, in fact, refused—and still refuse—to engage in gambling without wagers of significant amounts of money .... The time and places where gambling was engaged in were controlled, sanctified and protected by traditional leaders of Indian communities ... . [T]he sponsoring community did indeed receive monies and/or goods for services provided to visitors or participants who came to gamble, wager, or observe gaming.... After Indians began to deal socially and economically with non-Indians throughout the Spanish, Mexican and American periods, non-Indians were encouraged to come to [gamble].

Declaration of and Report by Lowell John Bean, Excerpt of Record at 476, 478, 479, 481.

Dr. Bean concludes from his nearly 30 years of research on these Indians and his many years of living on the Morongo Reservation that:

> As an anthropologist, I see the presence of the Tribal Bingo enterprises on the Morongo and Cabazon Reservations as being a present day adaptation of the traditional ways of the Cahuilla people, *e.g.*, the use of tribal lands for gaming, recreation, and generating an income from gambling and spending by outsiders for the benefit of the reservation.

Id. at 476-77.

Although the above-quoted record fully supports a finding of a tribal tradition of sponsoring gaming to raise funds for the tribes' benefit, the tribes contend that it was not this Court's intention in *Rice* to scrutinize the historical record concerning the precise activity involved and the specific traditions relating thereto. Rather, the tribes believe that the Court was determining whether there was a legal tradition of self-government over the subject area in question and whether the activity sought to be controlled was an area of traditional governmental regulation which was left to the tribes.

In *Rice*, this Court was specifically called upon to interpret 18 U.S.C. § 1161, which provides that liquor may be sold on the reservations "in conformity with the laws of the state . . . and with [a tribal ordinance]." Reviewing that statutory language, this Court determined that there had been a congressional delegation to the state of concurrent regulatory authority. It is in that context that the notion of tribal tradition took on importance because this Court found that there was no legal tradition of tribal self-government in the area of alcohol regulation. The Court stated that

> [a]lthough in Indian matters Congress usually acts "upon the assumption that the States have no power to regulate the affairs of Indians on a reservation" . . . that assumption would be unwarranted in the narrow context of the regulation of liquor.

Rice, 463 U.S. at 723. To reach this conclusion, the Court traced the legal history of both federal and state regulation of liquor on Indian reservations, *id*, and determined that "there can be no doubt that Congress has divested the Indians of inherent power to regulate in this area." *Id.* at 724.

The tradition of tribal self-government is far different with regard to gaming. According to the House Report on H.R. 1920:

> There are vast historical differences in the manner that the United States has treated alcohol and gaming activities in Indian country. Except for a prohibition against the operation of mechanical devices such as slot machines, the federal government has never attempted to prohibit or regulate gambling activity within Indian country. In like manner there is no specific or general Federal law conferring authority on States to regulate gaming activity within Indian country.

Appendix at 26a. Thus, the facts here are the opposite of those in *Rice* where liquor regulation had been controlled by the states since colonial times. The historical lack of any state control of reservation gaming justifies the Ninth Circuit's conclusion that there is a tradition of self-government with regard to gaming activities such as those at issue herein.

The appellants read *Rice* far too narrowly in arguing that unless a given tribe can demonstrate through historical or anthropological evidence that it has "traditionally" engaged in a particular activity, a state can exercise regulatory jurisdiction over such on-reservation tribal conduct. Were the appellants to prevail with this argument, every case involving tribal jurisdiction would be reduced to a battle of anthropological experts, quibbling over historical minutia. And, more important, such an approach would require each issue to be litigated tribe by tribe across the country for, despite some similarities, the tribes have varied cultures and traditions.

Federal and state courts have routinely upheld the rights of tribal governments to regulate activities that Indian tribes have not engaged in "traditionally." *Red Lake Band of Chippewa Indians v. Minnesota*, 248 NW.2d 722 (1976)

(vehicle registration); *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981) (air quality regulation); *Knight v. Cheyenne Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (zoning); *Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (automobile repossession). They have done so because Indian tribes are governments and as the court below noted, these are "traditional governmental functions," Appellants' Appendix at A-11.

Indian cultures, like all cultures, evolve and develop. The position advanced by the State here would permanently lock Indian people into the role of subsistence farmers and dip net fishermen, living in hogans and selling baskets by the side of the road. This "traditional" Indian existence for which the State argues is clearly contrary to the twin goals of current federal Indian policy: promoting tribal self-government and fostering successful reservation economic development. In this case, the tribes are raising needed tribal revenues through activities which are regulated by the tribal governments, permitted by the state, and sanctioned by the Federal Government. Under these circumstances, the court of appeals was correct in holding that the assertion of state regulatory jurisdiction over this traditional governmental function would unlawfully infringe on the tribes' right of self-government.

CONCLUSION

In *Santa Rosa v. Kings County*, *supra*, the court of appeals stated that subjecting Indian communities to civil regulatory jurisdiction of state or local governments would "dilute if not altogether eliminate Indian political control of the . . . development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian" communities who "may not share the usually poorer Indian's priorities, or may in fact be in economic competition" with them. 532 F.2d at 664.

The court went on to say: "there may inevitably be some abrasion between Indian communities and local neighbors. That, however, does not dictate eliminating Indian jurisdiction." *Id.*

Because state jurisdiction over reservations is strongly disfavored, *Bryan, supra*, 426 U.S. at 376, n.2; because ambiguities in statutes concerning Indian tribes are to be resolved in favor of the Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, n.17 (1978), and for the reasons stated above, the Morongo and Cabazon Bands of Mission Indians urge this Court to let stand the court of appeals decision in this case by dismissing the appeal for lack of jurisdiction and denying the resultant petition for writ of certiorari, or affirming the judgment below.

Respectfully submitted,

GLENN M. FELDMAN
ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

Attorneys for Appellee
Cabazon Band of Mission Indians

BARBARA E. KARSHMER
ALEXANDER & KARSHMER

Attorneys for Appellee
Morongo Band of Mission Indians

Dated: May 19, 1986

APPENDIX

APPELLEES' APPENDIX 1

99TH CONGRESS | HOUSE OF REPRESENTATIVES | REPORT
2d Session | 99-448

ESTABLISHING FEDERAL STANDARDS AND REGULATIONS FOR THE CONDUCT OF GAMING ACTIVITIES ON INDIAN RESERVATIONS AND LANDS, AND FOR OTHER PURPOSES

MARCH 10, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the committee on Interior and Insular Affairs,
submitted the following

REPORT

together with

SUPPLEMENTAL AND DISSENTING VIEWS

[To accompany H.R. 1920]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 1920) to establish Federal standards and regulations for the conduct of gaming activities on Indian reservations and lands, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following in lieu thereof:
That this Act may be cited as the "Indian Gaming Regulatory Act".

SEC. 2. (a) The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Indian tribes have the exclusive right to regulate gaming activity on Indian lands which is not specifically prohibited by Federal law and which is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity;

(3) there are no existing statutes which require approval of management contracts dealing with Indian gaming;

(4) existing Federal law does not provide clear standards or regulations necessary to insure the orderly conduct of gaming activities on Indian lands;

(5) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(6) tribal operation and licensing of gaming activites is a legitimate means of generating revenues.

(b) The Congress declares that the establishment of Federal standards for gaming activity on Indian lands and a National Indian Gaming Commission are necessary to meet the concerns regarding gaming activities and to protect such activities as a means of generating tribal revenue.

SEC. 3. (a) Except as provided in subsection (b), Class II and III gaming regulated by this Act shall be unlawful on any lands acquired by the Secretary, under any existing authority, in trust for the benefit of any Indian tribe after

December 4, 1985, if such lands are located outside the boundaries of such tribe's reservation.

(b) Subsection (a) shall not apply if the Indian tribe requesting the acquisition of such lands in trust obtains the concurrence of the Governor of the State, the State legislature, and the governing bodies of the county and municipality in which such lands are located.

SEC. 4. Provisions of the Internal Revenue Code of 1954, as amended, concerning the taxation and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations.

SEC. 5. (a) There is established within the Department of the Interior an independent commission to be known as the National Indian Gaming Commission.

(b)(1) The Commission shall be composed of eight members as follows:

(A) a Chairman who shall serve full-time and who shall be appointed by, and serve at the pleasure of, the Secretary;

(B) a member to be selected by the Attorney General and appointed by the Secretary;

(C) five members, at least three of whom shall be enrolled members of Federally recognized tribes, to be appointed by the Secretary from a list of not less than ten nor more than twenty candidates submitted and approved by a majority of the tribes then engaged in or regulating gaming activities; and

(D) one member appointed by the Secretary after consultation with appropriate organizations or entities, who shall represent the interest of the States.

(2) Not more than four members of the Commission shall be of the same political party.

(3)(A) Except for the Chairman and except as otherwise provided in this paragraph, members shall be appointed for terms of three years.

(B) Of the members first appointed—

(i) the member appointed pursuant to paragraph (1)(B) and two of the members appointed pursuant to paragraph (1)(C) shall be appointed for a term of two years; and

(ii) the remaining members appointed pursuant to paragraph (1)(C) and (1)(D) shall be appointed for a term of three years.

(4) Any individual who—

(A) has been convicted of a felony or gaming offense;

(B) has any management responsibility in any gaming activity regulated pursuant to this Act; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act shall not be eligible for appointment to, or to continue service on, the Commission.

(5) Except for the Chairman, a member of the Commission may be removed for good cause by a majority vote of the remaining members subject to the approval of the Secretary or, in the case of a member appointed pursuant to paragraph (1)(B), the Attorney General.

(c)(1) Vacancies occurring on the Commission as a result of the expiration of the terms of appointment shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term until his successor has been appointed.

(2) Other vacancies occurring on the Commission shall be filled by a majority vote of the Commission and members so appointed shall serve the remainder of the terms for which his predecessor was appointed.

(d) Five members of the Commission shall constitute a quorum.

(e) The Commission shall select, by majority vote, one of the members to serve as Vice-Chairman who shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) The Commission shall meet at the call of the Chairman or a majority of its members.

(g)(1) The Chairman of the Commission may be paid at a rate equal to that of Level V of the Executive Schedule (5 U.S.C. 5316).

(2) Except as provided in paragraph (3), the other members of the Commission may each be paid at a rate equal to the daily equivalent of the maximum annual rate of basic pay in effect for grade GS-18 of the General Schedule (5 U.S.C. 5332) for each day, including travel time, during which they are engaged in the actual performance of duties vested in the Commission.

(3) Members of the Commission who are full-time officers or employees of the United States shall receive no additional pay by reason of their service on the Commission.

(4) All members may be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

SEC. 6 (a) The Chairman of the Commission shall have the exclusive power—

(1) to approve tribal ordinances or resolutions regulating Class II gaming as provided in section 11(b);

(2) to approve management contracts for Class II and III gaming as provided in section 12; and

(3) to select, appoint, and supervise the staff of the Commission as provided in section 8.

(b) The Chairman shall have power, subject to the approval of the Commission—

(1) to appoint a General Counsel of the Commission;

(2) to promulgate regulatory schemes for Class III gaming as provided in section 11(c); and

(3) to issue orders of temporary closure of gaming activities as provided in section 14(b).

(c) The Chairman shall have power, subject to an appeal to the Commission—

(1) to approve or disapprove tribal ordinances or resolutions and licenses for Class III gaming as provided in section 11(c); and

(2) to levy and collect civil fines as provided in section 14(a).

(d) The Chairman shall have such other powers as may be delegated by the Commission.

SEC. 7. (a) The Commission shall have specific power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 17;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by a vote of not less than five members, to adopt the annual assessment as provided in section 17;

(4) by a vote of not less than five members, to authorize the Chairman to issue subpoenas as provided in section 15; and

(5) by a vote of not less than five members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b).

(b) The Commission shall have power—

(1) to monitor Indian gaming activities on a continuing basis;

(2) to inspect and examine all premises where Indian gaming is conducted;

(3) to conduct or cause to be conducted such background investigations as may be necessary;

(4) to demand access to and inspect, examine, photocopy, and audit all papers, books, records respecting gross income of a gaming activity and all other matters necessary to the enforcement of this Act;

(5) to use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States;

(6) to procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) to enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission;

(8) to hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) to administer oaths or affirmations to witnesses appearing before the Commission; and

(10) to establish and implement such other standards, guidelines, and regulations as it deems appropriate not inconsistent with this Act and other applicable law.

SEC. 8. (a) The Chairman, with the approval of the Commission, shall appoint a General Counsel to the Commission who shall have a background in Indian affairs. The General Counsel may be paid at the annual rate of basic

pay payable for GS-18 of the General Schedule (5 U.S.C. 5332).

(b) The Chairman shall appoint other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) The Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Act, unless otherwise prohibited by law.

(e) The Secretary or Administrator of General Services shall provide to the Commission on a reimburseable basis such administrative support services as the Commission may request.

SEC. 9. The Commission may secure directly from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

SEC. 10. The Secretary shall promptly appoint the members of the Commission, as provided in section 5 of this Act, and shall provide staff and support assistance to en-

able the Commission to meet and organize as soon as practicable thereafter.

SEC. 11. (a)(1) Class I gaming shall be within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2)(A) Except as provided in subparagraph (B) and (C), Indian tribes may engage in, or license and regulate, Class II or Class III gaming activity on Indian lands if the governing body of the Indian tribe adopts an ordinance or resolution to that effect which is approved by the Commission pursuant to subsection (b) or (c) of this section. Licenses are required for each place, facility, or location of Class II or Class III gaming activities.

(B) Subparagraph (A) shall not apply with respect to an Indian tribe if—

(i) a gaming activity is specifically prohibited on Indian lands by Federal law; or

(ii) such gaming activity is prohibited by the State within which such tribe is located as a matter of State public policy and criminal law.

(C) Subparagraph (A) shall not apply to gaming on Indian lands located within the State of Nevada.

(b)(1) An Indian tribe may engage in, or license and regulate, Class II gaming activity on the Indian lands of such tribe if the governing body of the tribe adopts an ordinance or resolution which is approved by the Chairman.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, licensing, or regulation of Class II gaming activity on the Indian lands of such tribe if such ordinance or resolution provides that—

(A) except as provided in paragraph (3), the Indian tribe itself shall have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming activity are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

Provided, That, if such net revenues are directly or indirectly used for per capita payments to tribal members, those payments are subject to Federal tax.

(C) annual outside independent audits of the gaming activity will be obtained by the Indian tribe and made available to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually, except contracts for professional legal or accounting services, relating to such gaming activity shall be subject to such independent audits; and

(E) the construction and maintenance of the gaming facility, and the operation of that gaming activity, is conducted in a manner which adequately protects the environment and the public health and safety.

(3) A tribal ordinance or resolution may provide for the licensing or regulation of Class II gaming activities owned by individuals or entities other than the Indian tribe, except that the tribal licensing requirements shall be at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such tribe is located. No individual or entity, other than the tribe, shall be eligible to receive a tribal license to own a Class II gaming activity within the tribe's ju-

risdiction if such individual or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(4) Not later than one hundred and sixty days after the submission of any tribal gaming ordinance or resolution, the Chairman shall approve such ordinance or resolution if it meets the requirements of this subsection. Any such ordinance or resolution not acted upon at the end of that one hundred and sixty day period shall be deemed to have been approved by the Chairman.

(c)(1) An Indian tribe may engage in, or license and regulate, Class III gaming activity on the Indian lands of such tribe if the governing body of the tribe adopts an ordinance or resolution which meets the requirements of this subsection and which is approved by the Chairman.

(2) The Commission shall adopt comprehensive gaming regulations for Class III gaming. Such regulations shall be identical to that provided for the same or similar gaming activity by the State within which such Indian gaming activity is to be conducted.

(3) Where any State law or regulation adopted by the Commission pursuant to paragraph (2) involve criminal penalties for violation thereof, such criminal penalties shall be enforceable by—

(A) the State where such State has the requisite criminal jurisdiction over Indian reservations pursuant to Public Law 83-280, or

(B) by the United States pursuant to the Assimilative Crimes Act (18 U.S.C. 13),

as if such criminal penalties were part of the criminal/prohibitory laws of such State.

(4) The Chairman shall approve a tribal ordinance or resolution relating to the conduct of Class III gaming activity and shall issue a license to engage in such activity

if the ordinance or resolution meets the requirements of subsection (b)(2) and (3) of this section and conforms to the regulations adopted by the Commission pursuant to paragraph (2) of this subsection.

(5) Prior to approving a license pursuant to this subsection, the Chairman shall prepare and take into consideration an analysis of the prospects for the proposed gaming activity to operate in a profitable and economically sound manner. The analysis shall, as a minimum, include:

(A) a summary of the capital outlays needed to begin operations and the long-term financing requirements;

(B) the financing method and proof of availability of financing;

(C) the impact of granting a license on both the tribal and nearby non-Indian communities; and

(D) the ability of the licensee to monitor and insure that gaming operations are conducted in a fair and safe manner.

SEC.12. (a) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a Class II or III gaming activity, except that, before approving such contract, the Chairman shall require and obtain the following information:

(1) The name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a financial interest in, or management responsibility for, such contract, or, in the case of a corporation, those individuals who serve on the Board of Directors of such corporation and each of its stockholders who hold (directly or indirectly) ten percent or more of its issued and outstanding stock;

(2) a description of any previous experience which each person listed pursuant to paragraph (1) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had contact relating to gaming; and

(3) a complete financial statement of each person listed pursuant to paragraph (1).

(b) Any management contract entered into pursuant to this section shall specifically provide—

(1) that adequate accounting procedures are maintained and that verifiable financial reports are prepared by or provided to the tribal governing body on a monthly basis;

(2) that appropriate tribal officials shall have reasonable access to the daily operations of the gaming activity and shall have the right to verify the daily income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) that the term of the contract shall not exceed five years; and

(6) for grounds and mechanisms for terminating such contract; *Provided,* That contract termination shall not require the approval of the Commission.

(c) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if he determines that such percentage fee is reasonable in light of surrounding circumstances, but in no event shall such fee exceed forty percent of the net revenues.

(d) Not later than one hundred and twenty days after the submission of a contract, the Chairman shall approve or disapprove such contract on its merits. Any such contract not acted upon at the end of such time shall be deemed to have been approved by the Chairman.

(e)The Chairman shall not approve any contract where he determines that:

(1) any person listed pursuant to paragraph (a)(1) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statement or information to the Commission or the tribe pursuant to this Act; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance

or resolution adopted and approved pursuant to this Act, or

(4) a trustee exercising the skill and diligence that a trustee is commonly held to would not approve the contract.

(f) The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) No management contract for the operation and management of a Class II and III gaming activity shall transfer or, in any other manner, convey any interest in land or other real property unless clearly specified in writing in said contract.

SEC. 13. (a) As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act, adopted an ordinance or resolution authorizing Class II or III gaming or entered into a management contract, that such ordinance, resolution, or contract must be submitted for his review within sixty days of such notification.

(b)(1) Within ninety days after the submission of an ordinance or resolution authorizing Class II gaming pursuant to subsection (a), the Chairman shall review such ordinance to determine if it conforms to the requirement of section 1(b) of this Act.

(2) If he determines that such ordinance or resolution conforms to section 11(b), he shall approve it.

(3) If he determines that such ordinance or resolution does not conform to the requirements of section 11(b), he shall provide written notification of necessary modifications to the Indian tribe which shall have not more than one hundred and twenty days to come into compliance.

(c)(1) Within ninety days after the adoption by the Commission of a Class III regulatory scheme governing the type of gaming involved in a Class III ordinance or resolution submitted pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to such regulatory scheme and the appropriate requirements of section 11(b) of this Act.

(2) If he determines that such ordinance or resolution conforms to such regulatory scheme and to the requirements of section 11(b), he shall approve it and issue any necessary license.

(3) If he determines that such ordinance or resolution does not conform to such regulatory scheme and to the requirements of section 11(b), he shall provide written notification of necessary modification to the Indian tribe which shall have not more than one hundred and twenty days to come into compliance.

(d)(1) Within one hundred and eighty days after the submission of a management contract pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 12 of this Act.

(2) If he determines, at the end of such period, that such contract and the management contractor meet the requirements of section 12, he shall provide written notification to the parties to such contract of modifications necessary to come into compliance and the parties shall have not more than one hundred and twenty days to come into compliance.

(4) Where a management contract submitted pursuant to subsection (a) has been previously approved by the Secretary or his representative, said contract shall be deemed in compliance hereof and no further action shall be required.

SEC. 14. (a)(1) The Commission shall have authority to authorize the Chairman to levy and collect appropriate civil

fines, not to exceed $10,000 per violation, against an Indian gaming activity or a management contractor engaged in gaming activities regulated by this Act or by regulations adopted by the Commission pursuant to this Act.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(b)(1) The Chairman shall have power to order temporary closure of Indian gaming activities for substantial violation of the provisions of this Act or regulations adopted by the Commission pursuant to this Act.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. The Commission may, by a vote of not less than five of its members, order a permanent closure of the gaming operation after such hearing.

(c) A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal District Court pursuant to the Administrative Procedures Act, title 5, United States Code.

SEC. 15. (a)(1) The Commission may authorize the Chairman to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter which the Commission is empowered to investigate by this Act.

(2) Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States.

(3) If a person issued a subpoena under paragraph (1) refuses to obey such subpoena or is guilty of contumacy,

any court of the United States within the judicial district within which the hearing is conducted or within the judicial district within which such person is found or resides or transacts business may, upon application of the Commission, order such person to appear before the Commission to produce evidence or to give testimony relating to the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) The subpoenas of the Commission shall be served in the manner provided for subpoenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

(5) All process of any court to which application may be made under this section may be served in the judicial district in which the person required to be served resides or may be found.

(b) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to a subpoena, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture by reason of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 16. (a) Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this Act as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5, United States Code.

(b) The Commission may, when such information indicates a violation of Federal, State, or tribal criminal statutes or ordinances, provide such information to the appropriate law enforcement officials.

(c) The Attorney General of the United States is authorized to investigate activities associated with gaming authorized by this Act which may be a violation of Federal law, including but not limited to the Major Crimes Act (18 U.S.C. 1153), the Assimilative Crimes Act (18 U.S.C. 13), and 18 U.S.C. 1163. The Attorney General is authorized to enforce such laws, or assist in the enforcement of such laws, upon evidence of violation as a matter of Federal law, or upon the referral of information by the Commission pursuant to section 16(b) of this Act.

SEC. 17. (a)(1) Not less than three-quarters of the annual budget of the Commission shall be derived from an assessment of not to exceed two and one-half percent of the gross revenues from each Indian gaming activity regulated pursuant to this Act.

(2) The Commission, by a vote of not less than five of its members, shall annually adopt the rate of assessment authorized by this section which shall be uniformly applied to all gaming activities and which shall be payable on a quarterly basis.

(3) Failure to pay the assessment shall, subject to the regulations of the Commission, be grounds for revocation of any approval or license of the Commission required under this Act for the operation of tribal gaming.

(4) To the extent that funds derived from such assessments are not expended or committed at the end of the budget year, such surplus funds shall be credited to each gaming activity on a pro rata basis against the assessment for the succeeding year.

(5) For purposes of this section, gross revenues shall constitute the total wagered monies less any amounts paid out as prizes awarded.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal cycle of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 18, in an amount not to exceed one-third the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to section 16 shall be subject to the approval of the Secretary and shall be included as part of the budget request of the Department of the Interior.

SEC. 18. (a) Subject to the provisions of the section 17, there is hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission.

(b) Notwithstanding the provisions of section 17, there is hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for the first fiscal year after the date of enactment of this Act.

SEC. 19. For the purposes of this Act—

(1) "Attorney General" means the Attorney General of the United States;

(2) "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act;

(3) "Indian lands" means—

(i) all lands within the limits of any Indian reservation; and

(ii) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or which is held by any Indian tribe or individual subject to a restriction by the United States against alienation over which an Indian tribe exercises governmental power;

(4) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians and is recognized as possessing powers of self-government;

(5) "gaming" means to deal, operate, carry-on, conduct, or maintain for play any banking or percentage game of chance played for money, property, credit, or any representative value, and shall consist of—

(A) "Class I gaming" which shall include social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of or in connection with tribal ceremonies or celebrations;

(B) "Class II gaming" which shall include the game of chance commonly known as bingo or lotto and which is played for prizes, including monetary prizes, with cards bearing numbers or other designations, the holder covering such numbers or designations as objects, similarly numbered or designated, are drawn or electronically determined from a receptical and the game being won by the person first covering a previously designated arrangement of numbers or designations or such card, and shall also include pull-tabs, punch boards, and other games similar to bingo; and

(C) "Class III gaming" which shall include all other forms of gaming not defined in subparagraph (A) and (B) of this paragraph.

(6) "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses including management fees; and

(7) "Secretary" means the Secretary of the Interior.

SEC.20. Consistent with the requirements of this Act, 18 U.S.C. Sec. 1307 shall apply to any gaming activity conducted by a Tribe pursuant to this Act.

SEC. 21. In the event that any section or provision of this act is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act shall continue in full force and effect.

PURPOSE

The purpose of H.R. 1920, by Mr. Udall and others, is to establish Federal standards and regulations for the conduct of gaming activities on Indian reservations.

BACKGROUND

Although Indian tribes have engaged in the operation of gaming activities on their reservations for some time and although some tribes have conducted bingo operations on a regular basis since at least 1974, it is not until recently that such gaming operations have begun to proliferate at a rapid pace. Recent information indicates that at least 80 such operations are currently in existence.

Tribal involvement in the conduct of gaming activities started to increase after the seminal case of *Seminole v. Butterworth,* 658 F 2d. 310 (1982).

In this case, the 5th Circuit upheld a ruling of the Federal District Court that the Seminole Tribe of Florida could

engage in bingo gambling within the reservation free of State licensing and State regulation. While the court found that the State of Florida has criminal and civil jurisdiction over the Seminole reservation pursuant to Public Law 83-280, it found that, pursuant to the Supreme Court's Decision in *Bryan V. Itasca County,* 426 U.S. 373 (1976), P.L. 83-280 did not confer general regulatory power over Indian tribes.

Therefore, the question of whether or not Florida had the right to license and regulate bingo operations on the Seminole Reservation turned on whether the State law regulating bingo operations was *criminal/prohibitory* in nature or *civil/regulatory.* Finding that the operation of bingo games in Florida was not prohibited by the State law as against public policy, but merely regulated, the Court held that the State law was civil/regulatory in nature and, therefore, was not applicable to bingo operations on the Indian reservation. Similar decisions were handed down in the case of *Oneida Tribe of Indians* v. *Wisconsin,* 518 F. Supp. 712 (1981) and *Barona Group of the Capitan Grande Band of Mission Indians* v. *Duffy,* (9th Circuit; 1982).

Whether a certain activity is against the public policy of the State has also determined whether such gambling activity is legal under the Organized Crime Control Act of 1970. This Act prohibits gambling businesses which are in violation of the laws of the State in which they are located. The Federal courts have concluded that gambling activities which are regulated rather than prohibited by State law are not against the public policy of the State and therefore not violative of the Organized Crime Control Act. See: *U.S.* v. *Farris,* 624 F. 2nd 890 (9th Cir. 1980).

Besides the favorable court decisions, it is clear that in these times of Federal budget reductions many tribes which have traditionally relied on Federal funding to conduct their tribal government operations, have found the reve-

nues generated from tribal gaming operations on the reservations to be a welcome source of funds to replace dwindling Federal funds. As the Department of the Interior stated during its testimony on the bill:

> Indian reservation gambling provides economic benefit to many of the tribes involved, especially those with no valuable natural resources or other significant sources of income. Tribes have used their bingo income for a variety of purposes relating to the welfare of their members including * * * payment of medical expenses for tribal members * * * fire department equipment and operation, road repairs, and flood control repair.

The proliferation of tribal gaming operations was also encouraged by President Reagan's Indian Policy Statement which encouraged the tribes to reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government and which pledged to assist tribal governments by removing impediments to tribal self-government. This policy also encouraged private sector involvement and innovative approaches to overcome the legislative and regulatory impediments to economic progress. To comply with this policy and Federal law, the Department of the Interior has approved tribal ordinances and laws providing for tribal regulations of gaming activities on Indian lands and testified during the Committee hearings that, "We wish to permit continuation of Indian bingo as a matter of Federal policy, but recognize that it had to be regulated effectively to avoid the potential law enforcement problems."

It is precisely such potential law enforcement concerns and especially allegations of criminal infiltration by organized crime which first interested the Committee in the issues facing gaming on Indian lands. On the issue of organized crime, the Committee has not found any conclusive evidence that such infiltration has occurred. The

Justice Department, in its testimony on the bill stated that, while it did not claim that Indian gambling operations were presently "mobbed-up", there was still a potential for such infiltration by organized crime especially after such operations have become successful and have established their credentials and legitimacy.

The conclusion that organized crime has not infiltrated Indian gaming operations is also reflected in the findings of the 9th Circuit Court of Appeals decision in *Cabazon Band of Mission Indians and Morongo Band* v. *Riverside* (February 26, 1986) which stated that, in spite of the State's concerns about intrusion by organized crime in California, "There is no evidence whatsoever that organized crime exists on these reservations."

In this recent 1986 Opinion, the State of California had argued that the recent decision of *Rice* v. *Rehner*, 463 U.S. 713 (1983) demanded a re-examination of the civil/regulatory-criminal/prohibitory distinction because the Supreme court had rejected what it terms a "substantive-regulatory" distinction in interpreting the intent of a Federal statute which exempted from Indian Country the application of certain Federal laws regulating alcohol. The Supreme Court in *Rice* held that such statute did give the States concurrent jurisdiction with the tribes over liquor regulations in Indian country.

The 9th Circuit, however, in its 1986 decision, held that the Supreme Court's decision in *Rice* v. *Rehner* did not change the legal doctrines governing the legality of Indian gambling on Indian lands. Since P.L. 280 only vested the States with full criminal jurisdiction, and not with civil regulatory power in Indian Country, the question to be decided was still whether the State regulations concerning such gambling operations were criminal/prohibitory or civil/regulatory in nature. The Court held that since these gambling operations were not prohibited by the State public

policy, they were only civil/regulatory in nature and therefore not applicable in Indian Country.

The Supreme Court, in *Rice* v. *Rehner*, was not adopting a new doctrine by which to measure the extent of State power in Indian Country and was not espousing a new theory on Indian sovereignty. The Court instead was following a long line of legal precedents in attempting to measure the backdrop of Indian sovereignty in a preemption analysis. In the course of such analysis, the Court stated that, "The role of tribal sovereignty in preemption analysis varies with the particular notions of sovereignty developed from historical traditions of tribal independence." The Court included that, when it comes to liquor regulations, Indian sovereignty was not important because the Federal Government had divested the tribes from the power to regulate liquor on the reservation since colonial times. As a matter of fact, the Court concluded that there was an historical tradition of concurrent Federal and State jurisdiction over the use and distribution of alcohol on the reservation since some of the States were required to enact laws prohibiting the sale of liquor in Indian Country as a condition of entry into the United States.

There are vast historical differences in the manner that the United States has treated alcohol and gaming activities in Indian Country. Except for a prohibition against the operation of mechanical devices such as slot machines, the Federal government has never attempted to prohibit or regulate gambling activity within Indian country. In like manner, there is no specific or general Federal law conferring authority on States to regulate gaming activity within Indian Country.

While there has been a history of tribal gaming activity or gaming regulation for a number of years, it has only been in recent years that tribes have begun to develop gaming as an economic enterprise to generate tribal governmental revenue. These tribal gaming activities have

brought the Indian and non-Indian communities into conflict.

While Indian tribes have vigorously protested proposed actions to limit or infringe upon their rights to generate revenue to support tribal government and tribal programs, they have recognized that there may be a need to enact Federal legislation to protect these revenue-generating activities from over-reaching on the part of outside interests and from the attentions of criminal elements.

States and non-Indian parties interested in, or affected by, Indian gaming activity have felt threatened by these activities and have sought means to prohibit or restrict these activities. In some cases, they have sought to advance solutions which would subject the tribal activities to the laws of the State.

H.R. 1920, as amended, is an attempt to meet the concerns of all parties while preserving the integrity and rights of tribes to be governed by their own laws and protecting the right of tribes to generate necessary revenue to support tribal government and programs.

COMMITTEE AMENDMENT AND SECTION-BY-SECTION ANALYSIS

The Committee considered an amendment in the nature of a substitute for purposes of Committee markup. This Substitute, after further amendment, was adopted by the Committee as an amendment to H.R. 1920. The major provisions of the Substitute and its differences from H.R. 1920, as introduced, are discussed in the Explanation section of this report. A section-by-section analysis of the amended bill and a more detailed explanation of its provisions follows:

Section 1

Section 1 cites the Act as the "Indian Gaming Regulatory Act".

Section 2

Subsection (a) contains various congressional findings relating to the conduct of gaming activities on Indian reservations. Paragraph (1) notes that a number of tribes have engaged in gaming as a means of generating tribal revenues. The record developed by the Committee shows that many tribes, faced with severe cuts in Federal program aid supporting tribal government and tribal programs, and lacking a tax base or other source of governmental revenue, have turned to gaming as a source of such revenue. In this respect, they are not unlike many State governments who have turned to State lotteries or other forms of gaming to supplement their tax revenue.

Paragraph (2) finds that, under existing law, Indian tribes may engage in, or license and regulate, gaming activities on Indian lands where that activity is not prohibited by some specific Federal law and where it is conducted in a State which does not prohibit the gaming activity as a matter of the criminal laws of such State.

Paragraph (3) notes that there is no existing Federal law that requires Federal approval of management contracts relating to tribal gaming activities. Depending upon the provisions of such contract, it might be subject to approval by the Secretary of the Interior either under authority of 25 U.S.C. 81 or, if it involves the lease or encumbrance of Indian lands, under 25 U.S.C. 177 or some relevant provision of chapter 12 of 25 U.S.C. This bill would not affect those requirements, but would be supplemental thereto. Federal court decisions to this effect are *Wisconsin Winnebago* v. *Koberstein*, 762 F.2d 613, and *U.S. ex rel. Shakopee* v. *Pan American*, No. 4-85-880.

Paragraph (4) states that existing Federal law does not provide clear standards or regulations for the orderly conduct of gaming activities on Indian lands.

Paragraph (5) finds that a principal goal of Federal Indian policy is to promote strong tribal government and tribal self-sufficiency and economic development.

Paragraph (6) finds that revenue derived by a tribe from gaming operations is a legitimate source of funds for tribal government and programs.

Subsection (b) finds that the establishment of Federal standards and a National Indian Gaming Commission is necessary to meet the concerns regarding Indian gaming and to protect gaming activities as a source of tribal revenue.

Section 3

Subsection (a) provides that Class II and III gaming regulated by this Act shall be unlawful on any lands acquired by the Secretary in trust for an Indian tribe after December 4, 1985, if such lands are outside the boundaries of such tribe's reservation.

Subsection (b) provides that subsection (a) shall not be applicable if the tribe involved obtains the consent of certain State and local governing bodies.

Section 4

Section 4 provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) and chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities.

Section 5

Subsection (a) provides for the establishment of a National Indian Gaming Commission as an independent entity within the Department of the Interior.

Subsection (b), paragraph (1) provides that the Commission shall be composed of eight members with one appionted by the Secretary to serve as chairman, one to be selected by the Attorney General, five to be appointed by the Secretary from a list provided by Indian tribes engaged in gaming activities, and one to be appointed by the Secretary to represent State interests.

Paragraph (2) provides that not more than four of the members may be from the same political party.

Paragraph (3) provides for the terms of office of the Commissioners, except for the Chairman who will serve at the pleasure of the Secretary, and provides for staggered terms for the first panel of members.

Paragraph (4) prohibits any person who has been convicted of a felony or gaming offense, has any management responsibility for a gaming activity regulated under the Act, or has a financial or other interest in a management contract from being appointed to, or continue service on, the Commission.

Paragraph (5) authorizes removal of members of the Commission, except for the Chairman, by a majority vote of the rest of the members for good cause subject to the approval of the Secretary or, in the case of the member selected by the Attorney General, his approval.

Subsection (c) provides for the filling of vacancies on the Commission.

Subsection (d) provides that five members of the Commission shall constitute a quorum.

Subsection (e) provides for the selection of a Vice-Chairman by the Commission.

Subsection (f) provides that the Commission shall meet at the call of the Chairman or a majority of the members of the Commission.

Subsection (g) provides for the payment of the members of the Commission and reimbursement for travel, subsistence and other necessary expenses incurred in the performance of their duties.

Section 6

Subsection (a) gives the Chairman exclusive power to approve tribal ordinances relating to Class II gaming, approve management contracts for Class II and III gaming, and to select, appoint, and supervise Commission staff.

Subsection (b) gives the Chairman power, subject to the approval of the Commission, to appoint a General Counsel, promulgate regulatory schemes for Class III gaming, and to issue order of temporary closures of gaming activities.

Subsection (c) gives the Chairman power, subject to appeal to the Commission, to approve or disapprove Class III ordinances, resolutions or licenses and to levy and collect civil fines as provided by the Commission.

Subsection (d) provides that the Chairman shall have such other powers as may be delegated by the Commission.

Section 7

Subsection (a) provides that the Commission shall have the power, not subject to delegation, to approve the annual budget of the Commission, to adopt regulations for assessment and collection of civil fines, to adopt the annual assessments as provided in section 17 upon an affirmative vote of not less than five members, to authorize the Chairman to issue subpoenas by an affirmative vote of not less than five members, and by an affirmative vote of not less than five members and after a full hearing, to make permanent a temporary order of the Chairman for closure of a regulated gaming activity. It is the intent of the Committee that tribes or operators of tribal gaming activities subject to a permanent order of closure, in addition to any appeal rights, shall have the opportunity to reestablish

their gaming activity after meeting all compliance requirements of the commission.

Subsection (b) sets out numerous general powers of the Commission necessary for the implementation of the Act and its responsibilities.

Section 8

Subsection (a) authorizes the Chairman, with the approval of the Commission, to appoint a General Counsel with a background in Indian affairs and establishes a maximum rate of pay for such position.

Subsection (b) provides that the Chairman may appoint other authorized staff of the Commission without regard to laws governing appointments in the competitive service and without regard to the pay provisions of title 5, U.S.C., except that no one so appointed could be paid in excess of the rate of pay established for a GS-17.

Subsection (c) authorizes the Commission to procure temporary and intermittent services as provided in section 3109(b) of title 5, U.S.C.

Subsection (d) authorizes, at the request of the Chairman, other Federal agencies to detail personnel to the Commission unless otherwise prohibited by law.

Subsection (e) provides that the Secretary or the Administrator of GSA shall provide administrative support services to the Commission on a reimbursable basis.

Section 9

Section 9 authorizes the Commission to request, and heads of Federal agencies or departments to provide, information necessary to enable it to carry out this act, if not otherwise prohibited by law.

Section 10

Section 10 directs the Secretary to appoint the members of the Commission as soon as practicable and to provide interim staff and support assistance to the Commission.

Section 11

Subsection (a), paragraph (1) provides that class I gaming, defined in section 19 as social and traditional Indian gaming, shall remain in the exclusive jurisdiction of Indian tribes and shall not be subject to this Act. As with most cultures, most Indian tribes engaged in traditional gambling activities. The "stick" or "bone" game, with variations, was and is played among many Indian tribes, usually in conjunction with tribal ceremonies or feasts. Wagering on horse races or athletic contests, such as Lacrosse, was a common occurrence. Also, Indians engage in social, noncommercial gaming like poker in common with the rest of the Nation. It is these kind of activities which would not be covered under this legislation.

Paragraph (2)(A) provides that, except as limited in subparagraphs (B) and (C), Indian tribes may engage in, or license and regulate, Class II and III gaming on Indian lands if a tribal ordinance or resolution to that effect is approved pursuant to subsection (b) or (c) of this section. The subparagraph further provides that any licenses requires under the Act would be required for each place, facility, or location. It is the intent of the subparagraph that a tribal ordinance not be approved which provides a general, blanket authorization of a gaming activity.

Subparagraph (B) provides that gaming under subparagraph (A) would not be legal if (1) the gaming activity is specifically prohibited by Federal law or (2) it is prohibited by the State involved as a matter of public policy and criminal law. The only existing specific Federal law prohibiting gaming activity on Indian lands is found in section 1175 of title 15, United States Code, prohibiting

gambling device within Indian country. It is not the Committee's intent that general Federal laws limiting gaming activity be applicable to tribal gaming activity meeting the test of the second criterion of subparagraph (b).

The second limitation contained in subparagraph (b) is a recognition of existing law on gaming on Indian reservations as articulated in the cases of *Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. 1981) and *Barona Group of Capitan Grande Band, etc.* v. *Duffy*, 694 F.2d 1185 (9th Cir. 1982). The *Barona* case was reconfirmed by the 9th Circuit Court of Appeals in its February 25, 1986, decision in *Cabazon Band of Mission Indians* v. *County of Riverside et al.*, No. 84-6635. These cases, and several lower court cases, have held that where a State permits the operation of, and general public participation in, gaming activities, a tribe within that State may, as a matter of tribal and Federal law, engage in that activity free of State licensing and regulatory laws.

Subparagraph (C) provides that subparagraph (A) shall not apply to gaming on Indian lands within the State of Nevada. The effect of this provision is to leave the State of Nevada and the tribes where existing laws finds them. It is the intent that the provisions of H.R. 1920 not affect, in any way, what the existing law may be.

Subsection (b), paragraph (1) provides that an Indian tribe may engage in, or license and regulate, Class II gaming (defined in section 19 as including bingo and related games) if a tribal ordinance or resolution is approved by the Chairman of the Commission.

Paragraph (2) provides that the Chairman must approve such ordinance if it meets the minimum standards set out in the paragraph. Subparagraph (A) provides that the tribe, except as provided in paragraph (3), must have the sole proprietary interest and responsibility for conduct of the gaming activity. This is not meant to preclude the em-

ployment, by contract or otherwise, of non-tribal persons or entities to manage or operate the tribal enterprise.

Subparagraph (B) provides that net tribal revenues from the gaming activity may only be used to fund tribal government operations or programs; provide for the general welfare of its members; promote tribal economic development; denote to charitable organizations; or to help fund local government agencies. It further states that, if the funds are used to make per capita payments to tribal members, such payments will be subject to Federal taxation. It is not intended that this be the case if any of such revenue is taken in trust by the United States, in which case the provisions of the Act of August 2, 1983 (97 Stat. 365) would be applicable.

Subparagraph (C) requires that outside, independent audits be conducted annually on the gaming activity and be made available to the Commission.

Subparagraph (D) provides that all contracts for supplies, services, or concessions in excess of $25,000, except for legal or accounting services, be subject to such audits if related to the gaming activity. This language is to insure that ancillary services related to a gaming activity are subject to open audits as the Committee is advised that criminal elements often target these activities for infiltration.

Subparagraph (E) provides that the tribal ordinance shall provide that the gaming activity will be conducted in a way which would protect the environment and the public health and safety. It is not intended by this provision that the tribal gaming activity be subject to general Federal laws relating to the environment unless it would be so subject under existing law.

Paragraph (3) provides that a tribal ordinance or resolution may provide for the licensing and regulation of individuals and entities other than the tribe on the

reservation. However, the effect of the ordinance must be that any person or entity eligible for a tribal license would be eligible for a State license if they applied under State law and State jurisdiction. In addition, the ordinance must establish a tribal regulatory scheme for such non-tribal gaming activities which is no less stringent than that established by the State for gaming operations within its jurisdiction.

Paragraph (4) provides that the Chairman shall approve, within 160 days of submission, the tribal ordinance if it meets the minimum requirements of the subsection and, if he has not acted within such time, the ordinance shall be deemed approved.

Subsection (c) provides for the regulation of tribal Class III gaming (defined in section 19 as all forms of gaming other than Class I and II). Paragraph (1) provides that tribes may engage in, or license and regulate, Class III gaming if authorized by a tribal ordinance meeting the requirements of this subsection and approved by the Chairman.

Paragraph (2) provides that the Commission shall adopt comprehensive gaming regulations for Class III gaming which are to be identical to those provided for the same or similar gaming activity by the State in which the gaming is to be conducted. It is not the Committee's intent that all State law relating to gaming activity be incorporated into the Commission's regulatory scheme, only those which deal with the regulation of the conduct of ongoing games.

Paragraph (3) provides that, where there are criminal penalties attached to the civil/regulatory scheme, violations of those penal provisions can be enforced by the State, where the State has the necessary criminal jurisdiction under Public Law 83-280, or by the United States under the Assimilative Crimes Act (18 U.S.C. 13), as if such

criminal penalties were a part of the criminal/prohibitory laws of the State.

As noted by the Supreme Court in the case of *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply". By P.L. 82-280, Congress specifically transferred certain criminal and civil jurisdiction over Indians in Indian country to certain named States and authorized other States, under certain circumstances, to assume such jurisdiction. It is clear that States having been conferred or having assumed jurisdiction under P.L. 280 have full criminal jurisdiction over Indians within Indian country. However, any State civil jurisdiction deriving from P.L. 280 has been narrowly construed by the decision of the Supreme Court in the Case of *Bryan* v. *Itasca County*. 426 U.S. 373 (1976). The Court noted that the primary intent of the civil law provision of P.L. 280 was to grant State jurisdiction over private civil litigation involving Indians in State courts and not the full panoply of State civil/regulatory law. The court stated:

> * * * nothing in (P.L. 280's) legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than "private, voluntary organizations," *United States* v. *Mazurie*, 419 U.S. 544 (1975)—a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of State and local governments.

In upholding the power of Indian tribes, as a matter of tribal and Federal law, to engage in or license and regulate

gaming on Indian lands, the Federal courts have based their holdings on the Court's decision in the *Bryan* case. *Seminole Tribe* v. *Butterworth; Barona* v. *Duffy; Cabazon* v. *Riverside,* supra. The court's have held that, where a State permits the conduct of, and general public participation in, a gaming activity as a matter of State civil/regulatory law, Indian tribes within such State have a right to engage in, or license and regulate, such gaming activity on Indian lands free of State licensing and regulatory law. This is true even where criminal penalties may be attached to the regulatory laws. As noted in the *Seminole* case:

> Although inclusion of penal sanctions makes it tempting at first to classify the statute as prohibitory, the statute cannot be automatically classified as such. A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one. * * * The classification of the statute is more complex, and requires a consideration of the public policy of the state on the issue of bingo and the intent of the legislature in enacting the bingo statute.

The same limiting rationale would be true in non-P.L. 280 States where the United States would attempt to enforce State law within Indian country under the Assimilative Crimes Act or other general Federal statute. Paragraph (2) requires the Commission to adopt and apply to tribal Class III gaming the regulatory aspects of the State laws on gaming. Concerns were expressed to the Committee about the enforceability of any penal sanctions attached to those regulatory provisions. Paragraph (3) would permit the States or the United States, as appropriate, to enforce those criminal sanctions as if they were part of the criminal/prohibitory laws of the State.

Paragraph (4) provides that the Chairman shall approve an ordinance or resolution on Class III gaming and shall issue a license if the ordinance or resolution meets the minimum standards imposed on Class II gaming in subsection (b) and conforms to the regulations adopted by the Commission pursuant to paragraph (2).

Paragraph (5) provides that, prior to approving a Class III license, the Chairman shall make an analysis of the prospects for the proposed gaming activity as a sound economic enterprise. Included in such analysis would be a consideration of the financial foundation of the proposal, the impact of granting the license on tribal and near-by non-Indian communities, and the ability of the licensee to operate in a fair and safe manner. It is not the Committee's intent that this analysis be a cause for denial of a license, but a means of assisting the tribes in developing and implementing a profitable, safe source of tribal revenue.

Section 12

Subsection (a) provides that, subject to the Chairman's approval, an Indian tribe may enter into a management contract for the operation of a Class II or III gaming activity. It requires that, before approving such contract, the Chairman require and obtain detailed background and financial data on persons or entities associated with the management contractor.

Subsection (b) provides that any management contract entered into shall make specific provision that (1) adequate accounting procedures be maintained and verifiable financial reports be prepared by or submitted to the tribal governing body on a monthly basis; (2) appropriate tribal officials be guaranteed reasonable access to the daily operations of the gaming activity and have the right to verify daily income; (3) a minimum guaranteed payment to the tribe has preference over retirement of development and construction costs; (4) an agreed ceiling for the repayment

of such costs; (5) a maximum contract term of five years; and (6) grounds and mechanisms for terminating the contract, such termination not to require the approval of the Chairman.

Subsection (c) permits the Chairman to approve a contract with a fee based upon a percentage of the net revenues, but such percentage fee may not exceed forty percent.

Subsection (d) provides that the Chairman must approve or disapprove the contract on its merits within 120 days or, at the end of such period, the contract will be deemed approved.

Subsection (e) provides that the Chairman shall disapprove a contract where he determines that (1) a person listed in paragraph (a)(1) is an elected member of the tribal governing body, has been or subsequently is convicted of a felony or gaming offense, has knowingly provided materially false information to the Commission or tribes, or is of a general disreputable character; (2) the management contractor has or attempts to interfere or influence tribal government; (3) the management contractor has deliberately or substantially failed to comply with the contract terms or the tribal ordinance; or (4) a trustee exercising normal skill and diligence would not approve such contract.

Subsection (f) permits the Chairman, after notice and hearing, to require appropriate contract modification or to void such contract if he determines that violations of this section have occurred.

Subsection (g) provides that no management contract shall transfer or, in any manner, convey any interest in land or other real property unless specifically provided in the contract. It is not the Committee's intent to authorize or permit the conveyance or encumbrance of trust or restricted Indian property through such contract without

compliance with any existing Federal law regulating such property.

Section 13

Subsection (a) provides that, as soon as possible after organization of the Commission, the Chairman shall notify any tribe or management contractor who, prior to enactment of this legislation, adopted a tribal ordinance or entered into a contract on Class II or III gaming that such ordinance or contract must be submitted for his review within 60 days.

Subsection (b) provides that the Chairman, within 90 days after submission of a Class II ordinance under subsection (a), shall approve it if it conforms to section 11(b). If he determines that it does not, he shall advise the tribe of necessary modification and the tribe will have 120 days to come into compliance by making the necessary modifications.

Subsection (c) provides that the Chairman, within 90 days after adopting a Class III regulatory scheme by the Commission governing the gaming activity involved in a Class III ordinance submitted pursuant to subsection (a), shall review the ordinance to determine if it conforms to such regulatory scheme and meets the requirements of section 11(b). If he does, he shall approve the ordinance and issue the necessary license. If he determines it does not, he shall advise the tribe of necessary modification and the tribe shall have 120 days to come into compliance.

Subsection (d) provides that the Chairman, within 120 days after submission of a management contract pursuant to subsection (a), shall subject such contract to the requirements and process of section 12. If he determines that the contract and the management contractor meet the requirements of section 12, he shall approve the contract. If he determines that they do not, he shall provide notice to the tribe and to the contractor of necessary mod-

ifications and they shall have 120 days to come into compliance. The subsection also provides that, where the Secretary of the Interior or his representative has previously approved a contract submitted pursuant to subsection (a), such contract shall be deemed in compliance with the provisions of the Act and no further action shall be required. While the Committee intends that contracts previously approved by the Secretary shall be deemed in compliance with this Act, it is not intended that this would work to cure any legal insufficiency in such contract or approval under any other applicable tribal or Federal law.

Section 13 is a recognition by the Committee that there are numerous legal Indian gaming operations now being conducted on Indian lands and that those operations should be brought into compliance with the provisions of this law in a deliberate manner. It is not intended that those operations be affected by the provisions of this Act prior to the implementation of section 13.

Section 14

Subsection (a) provides that the Commission shall have authority to authorize the Chairman to levy and collect civil fines, not exceeding $10,000 per violation, against Indian gaming activities or management contractors for violations of the provisions of this Act or regulations adopted pursuant to the Act. It also provides that parties against whom the Chairman levies a fine shall have an opportunity for an appeal and hearing before the Commission.

Subsection (b) provides that the Chairman shall have power to temporarily close a gaming activity covered by this Act for substantial violation of the Act or regulations adopted by the Commission. The Indian tribe or contractor involved shall have a right to a hearing, within 30 days after an order of temporary closure, before the Commission to determine if the order should be made permanent. The Commission may order permanent closure after such

hearing only upon an affirmative vote of not less than five of its members.

Subsection (c) provides that final decisions of the Commission under subsection (a) and (b) shall be appealable to the appropriate Federal district court under the Administrative Procedures Act of title 5, United States Code.

Section 15

Subsection (a), paragraph (1) provides that the Commission may authorize the Chairman to issue subpoenas to compel the attendance of witnesses and the production of evidence that relates to matters which the Commission is empowered to investigate.

Paragraph (2) provides that witnesses and evidence may be required from any place in the United States to any place of hearing.

Paragraph (3) provides that, upon application by the Commission, appropriate Federal courts may enforce subpoenas of the Commission by holding defaulting parties in contempt of court.

Paragraph (4) provides that Commission subpoenas shall be served in the same manner as provided in the Federal Rules of Civil Procedures for Federal district courts.

Paragraph (5) provides that all process of any court to which application is made under this section may be served in the judicial district where the person required to be served resides or is found.

Subsection (b) provides that no person may refuse to comply with a subpoena on the grounds that any testimony given or evidence produced might tend to incriminate him, but no such person shall be subject to prosecution or any penalty or forfeiture by reason of being compelled to testify or produce evidence. However, the person would not be immune from prosecution and punishment for perjury in so testifying.

Section 16

Subsection (a) provides that, except as provided in subsection (b), the Commission shall keep confidential information received pursuant to this Act pursuant to section 552(b)(4) and (7) of title 5, U.S.C.

Subsection (b) provides that information covered by subsection (a) may be provided by the Commission to appropriate law enforcement officials when it indicates a violation of Federal, State or tribal criminal statutes or ordinances.

Subsection (c) provides that the Attorney General is authorized to investigate activities associated with gaming under this Act which might be a violation of Federal laws. The Attorney General is authorized to enforce or assist in the enforcement of such laws upon evidence of a violation as a matter of Federal law or upon referral of information from the Commission under subsection (b). This subsection is meant merely as a reaffirmation of the existing responsibility of the Attorney General to investigate and prosecute crimes within Indian country under existing Federal law.

Section 17

Subsection (a), paragraph (1) provides that not less than three-quarters of the Commission's annual budget shall be derived from assessments of Indian gaming activity of not to exceed two and one-half percent of gross revenues.

Paragraph (2) provides that the Commission, by an affirmative vote of not less than five of its members, shall annually adopt the rate of assessment which shall be uniformly applied to all gaming activities and payable on a quarterly basis.

Paragraph (3) provides that failure to pay the assessment shall be grounds for revocation of any approval or license of the Commission required for the operation of a gaming activity.

Paragraph (4) provides that funds assessed in one year and not expended shall be carried over and credited on a pro rate basis against assessments for the succeeding year.

Paragraph (5) defines gross revenue, for purposes of this section, as total wagered monies less amounts paid out as prizes.

Subsection (b), paragraph (a) provides that the Commission, in coordination with the Secretary of the Interior and in conjunction with the Federal fiscal cycle, shall annually adopt the budget for the Commission.

Paragraph (2) provides that the Commission may request Federal appropriations, as provided in section 18, which not exceed more than one-third of the total assessment authorized and collected in the preceeding fiscal year.

Paragraph (3) provides that the Commission's appropriation request shall be subject to the Secretary's approval and included in the budget request of the Department of the Interior.

Section 18

Subsection (a) provides that, subject to section 17, there is authorized to be appropriated for the expenses of the Commission such sums as may be necessary.

Subsection (b) provides that, notwithstanding section 17, there is authorized to be appropriated not to exceed $2,000,000 to fund the Commission in the first fiscal year after enactment.

Paragraph (3) provides that failure to pay the assessment shall be grounds for revocation of any approval or license of the Commission required for the operation of a gaming activity.

Section 19

Section 19 contains definitions of various terms used in the Act.

Section 20

Section 20 provides that, consistent with the provisions of the Act, section 1307 of title 18, United States Code, shall apply to tribal gaming activities. It is intended that gaming activities of an Indian tribe, whether operated directly by the tribe or under any managment contract, would be treated the same as a State-owned gaming activity.

Section 21

Section 21 contains a severance clause providing that the invalidation of any provision of the Act shall not operate to invalidate the remaining provisions.

EXPLANATION

As introduced, H.R. 1920 established minimum Federal standards for the conduct of gaming activities on Indian lands. The bill provided that a tribunal ordinance or resolution, meeting those minimum standards, was subject to the approval of the Secretary of the Interior. In addition, the bill required that management contracts entered into by Indian tribes for the operation of tribal gaming activities would be subject to Secretarial approval under stringent criteria governing elements of such contract and the contracting entity.

Indian tribes initially opposed the legislation as an unwarranted intrusion upon tribal governmental sovereignty and an impairment of legal rights confirmed through extensive litigation in the Federal courts. Tribal support did develop on the legislation, primarily because of Indian concern about growing over-reaching by outside management contractors and because of concerns being expressed about the possibility of infiltration of the games by elements or organized crime.

On the other side, opposition to the bill was advanced by some State governmental representatives and certain

private interest groups because of their concern about the impact of Indian gaming activity not being subject to the regulatory and enforcement laws of the States. This opposition was grounded in the belief that gaming activities of Indian tribal governments operated for the purpose of generating tribal governmental revenue.

After full Committee hearings on the legislation and the receipt of extensive correspondence from concerned parties, the Committee concluded that many of the concerns expressed on both sides of the issue had merit and warranted consideration in the amendatory process. At the direction of the Chairman, an amendment in the nature of a substitute was developed for Committee mark-up purposes. The Substitute sought to strike a middle ground between the opposing viewpoints. This Substitute, after further amendments, was ordered reported favorably by the Committee.

The Substitute made basic changes in the bill as introduced. The Substitute provides for the establishment of a National Indian Gaming Commission as an independent entity within the Department of the Interior and this commission is vested with the implementation of the Act instead of the Secretary of the Interior. Funding for the Commission will come primarily from assessments of tribal gaming activities.

The Substitute divides gaming activities into three classes: Class I including traditional Indian gaming and social gaming; Class I including bingo and related gaming; and Class III including all other forms of gaming.

Each class is treated differently in the Substitute. Class I is left to the exclusive jurisdiction of the tribes. Class II is generally left to the regulatory authority of the tribes, but with the requirement that a tribunal ordinance or resolution be approved by the Chairman of the Commission if it meets the minimum standards set out in the bill. In order to meet the concerns of the States and other non-

Indian parties, Class III gaming, while required to meet the same minimum standards of Class III, would also be subject to detailed regulation by the Commission which is required to adopt a regulatory scheme identical to that of the State in which such activity is conducted.

Finally, the substitute retains the requirements that management contracts be reviewed and approved, but the approval is vested in the Chairman of the Commission. The approval criteria for such contracts have been refined and tightened.

A more detailed explanation of the bill's provisions, as amended is contained in the section-by-section analysis of this report.

LEGISLATIVE HISTORY AND OVERSIGHT STATEMENT

H.R. 1920, introduced on April 2, 1985, by Representative Udall for himself and Representatives McCain, Richardson, Bates, Snowe, Seiberling, and McKernan, is similar to H.R. 4566 introduced by Mr. Udall in the 98th Congress. The Committee held hearings in the 98th Congress on H.R. 4566 on June 19, 1984.

In the 99th Congress, the Committee held three days of hearings on H.R. 1920 and related bills, H.R. 2420, H.R. 3130, H.R. 3745, and H.R. 3752. Hearings were held in Washington, D.C., on June 25, 1985; in San Diego, California, on September 13, 1985; and in Washington, D.C., on November 14, 1985. During these hearings, the Committee took oral testimony from the Departments of the Interior and Justice and from forty Indian and non-Indian public witnesses. In addition, the Committee received numerous statements submitted for the record and extensive correspondence on the subject of the legislation.

The Committee marked up H.R. 1920 on December 4 and 11, 1985. After extensive debate and amendments,

the Committee ordered the bill reported on December 11, 1985, with an amendment in the nature of a substitute.

Similar legislation, S. 902, is pending before the Senate Select Committee on Indian Affairs.

COMMITTEE RECOMMENDATIONS

The Committee on Interior and Insular Affairs, by voice vote on December 11, 1985, ordered H.R. 1920 favorably reported to the House with an amendment.

COST AND BUDGET ACT COMPLIANCE

The enactment of H.R. 1920 could result in a cost to the United States of up to $2,000,000 in the first fiscal year after enactment. Thereafter, the cost to the United States would be an indeterminate amount based upon a cost-sharing formula in the bill with Indian tribes with the tribes bearing 75% of the cost. The analysis of the Congressional Budget Office follows:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 1920.

2. Bill title: Indian Gaming Regulatory Act.

3. Bill status: As amended and ordered reported by the House Committee on Interior and Insular Affairs on December 11, 1985.

4. Bill purpose: This bill establishes the National Indian Gaming commission and the criteria by which it is to regulate Indian gaming. It also delineates the composition, compensation, and duties of the commission.

5. Estimated cost to the Federal Government"

[By fiscal years, in millions of dollars]

	1986	1987	1988	1989	1990	1991
Estimated authorization level	0.5	0.5	0.5	0.5	0.5	
estimated outlays	.5	.5	.5	.5	.5	

The costs of this bill fall within budget function 450.

Basis of estimate: The bill specifies that the commission shall receive at least 75 percent of its funding through assessments on gross gaming revenues, with the remaining funding to be appropriated. Gross gaming revenues are defined as the difference between total revenues and payouts. The assessment is limited to no more than 2.5 percent of gross revenues. The Bureau of Indian Affairs currently estimates annual gross revenues to be about $60 million. This implies annual assessments of up to $1.5 million and a maximum annual commission budget of $2 million, up to $0.5 million of which may be appropriated.

The estimate of the costs of H.R. 1920 is based upon these figures, which assume that gross revenues remain constant over time. Any change in gross revenues would be reflected in the annual funding of the commission, which would increase or decrease accordingly, with the limitation that, in the first fiscal year following the enactment of this bill, total appropriations shall not exceed $2 million. CBO estimates that gross revenues would have to increase tenfold in order for the commission to reach the $10 million to $15 million annual funding for gaming commissions in Nevada and New Jersey.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Paul M. DiNardo.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 1920 would have only a minimal inflationary impact.

DEPARTMENTAL REPORT

Reports were requested from the Department of the Interior and the Department of Justice on H.R. 1920 on October 15, 1985. To date, no report has been received by the Committee from either Department.

SUPPLEMENTAL VIEWS OF MR. UDALL

I feel compelled to respond to the dissenting views filed on this legislation. I feel compelled to do so as Chairman of the Committee which has jurisdiction over most Indian matters and as a member of Congress who has long fought and worked to better the condition of our Indian citizens and to protect their rights against an overwhelming majority.

The Constitution of the United States establishes the relations of this Nation with the Indian tribes. Under the Constitution, Congress has plenary power over Indian affairs and this responsibility has been vested by the House with this Committee.

In carrying out its plenary power over Indian affairs, the second act of the 1st Congress was to reenact the Northwest Ordinance of 1787 which provided in Article 3:

> * * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

High sounding words, indeed! A cursory review of our treatment of Indian tribes will reveal most readily that the promise and commitment has been observed more in the breach than in the fulfillment. The "utmost good faith" has not been observed.

The Northwest Ordinance statute has not been repealed and it remains the law of this Land. I will do my utmost

to honor the commitment and promise that it makes to the Indian tribes and our Indian citizens.

It may seem strange that I would raise a point of National honor and commitment in the context of legislation dealing with gambling. Gambling has always had overtones of immorality. I, personally, do not view gaming activities as an appropriate method of generating governmental revenues. That is not the issue here, however. Gambling, in one form or another, is now legal in almost all of the States. More and more States are turning, directly, to gambling as a revenue source to supplement tax revenue. That is understandable in an era of high Federal budget deficits and Gramm-Rudman.

It is even more understandable that Indian tribes would turn to that source of revenue. They have little, if any, tax base. They are almost solely reliant upon Federal funds and programs to provide even the most basic needs. Reservation Indians receive little support from State governments. As noted in the Supreme Court decision of *U.S.* v. *Kagama*, the Indians, "* * * owe no allegiance to the States, and receive from them no protection * * *"

No segment of our population has been more devastated by reductions in Federal programs. Gramm-Rudman, for the tribes, is not a matter of cutting the fat or even losing a little flesh. For them, it is literally a matter of life and death. It is little wonder that they have so desperately turned to gaming for revenue. It is hard to understand those who would deny them this small source of hope.

The Federal courts, interpreting existing Federal-Indian law, have held that Indian tribes may engage in gaming activities free of State law where the States permits gaming as a matter of its civil laws. The dissent suggests that this is unfair and notes the intent to offer an amendment to subject tribal government to State jurisdiction, an infringement upon existing Indian rights. They assert that

this is necessary because, "We need a level playing field * * *"

I, too, have been seeking a level playing field—a level playing field for the Indian tribes and their members:

> a level playing field in economic conditions, when nearly 40% of Indian families are below the income poverty line.
>
> a level playing field in housing, when nearly 50% of Indian housing is substandard.
>
> a level playing field in employment opportunities, when 50% of Indians 16 years and older are unemployed.
>
> a level playing field in health, when the per capita expenditure for Indians in 1985 was $660 compared with $1,200 for the rest of the Nation.

The truth is that, in every circumstance, Indian tribes and people have been playing in the bottom of a pit in the most affluent nation in the world.

I can have little sympathy for the plea of the dissent that their States and their affluent non-Indian constituents be given a level playing field in gaming activities when these kinds of conditions exist among our Indian citizens. The Indians, desperate for some source of revenue in the face of our budget-cutting mania, have found a small source of relief in gaming. Even this is to be taken from them.

In an attempt to protect the rights of Indian tribes, as is my duty under the Northwest Ordinance and, yet, to deal with the many legitimate concerns of States and non-Indian parties, I bring to the floor of the House a compromise bill. The compromises that I have made to deal with the concerns of the dissenters and others are not willing supported by the Indian tribes. Many tribes feel that these compromises of their rights unduly and unnecessarily intrude upon their right of self-government. Most,

very reluctantly, accept the compromises in order to achieve the protections of the legislation and *only* in the context of the Federal-Indian relationship.

In good faith to the Indians, I can offer no more compromise nor accept any further abrogation of the rights they have bargained for in hundreds of treaties ceding lands to this Nation. If an amendment is adopted to subject Indian tribes and their governments to State jurisdiction, I can no longer support this legislation and would feel compelled to oppose its enactment.

From my perspective as Chairman of the Committee to whom the House has entrusted its Constitutional responsibility for Indian tribes, the difference that I have with the dissent transcends the rather narrow and secondary issue of Indian gambling. It goes to the whole nature of our obligations and commitments to the Indian tribes and, ultimately, to the foundation of our form of government in which the rights of the minority are to be protected from the convenience of the majority. Felix S. Cohen, the author of the Handbook of Federal Indian Law and an early civil libertarian stated:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. * * *

In a "Dear Colleague" letter to members of my Committee before Committee markup, I cited another part of the Supreme Court decision in *U.S.* v. *Kagama:* "Because of local ill-feeling, the people of the States where (Indians) are found are often their deadliest enemies." Conferring State jurisdiction over tribal governments and their gaming activities would not insure a "level playing field", but would guarantee that Indian tribes could not gamble at all.

I urge the members of my Committee and the members of the House to reject the position and amendment proposed by the dissent.

MORRIS K. UDALL.

DISSENTING VIEWS

We have serious concerns about the method proposed by the Committee for regulating Class III gambling on Indian lands. It makes little sense to have the National Indian Gaming Commission regulate Class III gaming activity when the states already have in place the appropriate rules and enforcement mechanisms for doing so. We do not believe that the National Commission will have the appropriate funding or manpower to adopt and enforce regulations for all forms of Class III gambling that would take place on Indian lands.

Even though the Commission would be required to adopt identical state regulations, the committee makes it clear that it does not intend "that all state laws relating to gaming activity be incorporated into the Commission's regulatory scheme * * *" Thus, gambling on Indian lands would not be subject to the same rules as gambling on non-Indian lands. There is no justification for treating gaming activity on Indian lands more favorably than the same activity taking place off Indian land. We need a level playing field, and providing two sets of rules for gambling within a state is clearly unfair.

The problems faced by the Commission in adopting and enforcing identical state regulations would be enormous. Potentially, the Commission would have under its responsibility 50 different sets of regulations for each type of gaming activity. The task of monitoring each set of rules, for each type of gambling, in each state, is tremendous. It is extremely doubtful that any commission would be able to adequately enforce these regulations.

While the Committee has agreed to permit the states to have some jurisdiction over gambling on Indian lands in the few states covered by P.L. 280, this jurisdiction is extremely limited. As the report notes, while the states have full criminal jurisdiction over Indians within Indian

country under P.L. 280, any state civil jurisdiction in these states has been narrowly construed by the courts.

At a time when we are continuing to face large budget deficits and we are seeing a number of worthwhile federal programs cuts to the bone, it is incredible that we would consider vesting this National Indian Gaming Commission with such a large task as regulating all Class III gambling on Indian lands. We do not have the money available to fully fund the activities the Commission would be required to undertake in this legislation. We also would be duplicating work that is currently being done by the states in this same area.

The states are well-versed in all the methods that can be used to evade regulations and corrupt gambling. They know how animals can be drugged, games rigged, machinery tampered with, and crimes committed. They have the staff, regulatory apparatus, and expertise to prevent such abuses from creeping into Indian gambling. They also have experience in regulating on Indian lands as the states and tribes have had concurrent jurisdiction over alcohol sales on Indian lands since 1953.

To insure that the states will be able to continue their role in regulating gambling activities, an amendment will be offered on the House floor to place Class III gambling on Indian lands under state jurisdiction. By doing this, we will guarantee that the states have the responsibility for regulating all gambling within their borders, whether it takes place on Indian land, or off Indian land.

TONY COELHO.
JIM MOODY.
BEVERLY B. BYRON.
RICHARD H. LEHMAN.
MANUEL LUJAN, JR.

DISSENTING VIEWS

H.R. 1920 is unacceptable for three major reasons.

First, the primary reason for conducting gambling on Indian reservations is to generate revenue from non-Indians. The governing of certain types of social activities or businesses has been usually left entirely to the states. The management or the rules under which they operate for the sale of liquor, operation of bars and taverns, or even in rare cases, legalized prostitution has been traditionally left to the states and in our opinion that is where it should remain. The Federal Government should not be in the business of establishing and operating a National Indian Gambling Commission. The powers to control Class III Gambling should remain with the States.

The second reason for opposing this bill is of major importance. Who will monitor gambling operations such as horse racing, dog racing, poker tables, slot machines, Jai-Lai games, etc.? These games must be operated in a fair manner and on a continuous basis. Also, if animals are involved, assurances must be made to insure that all safety and health rules and regulations are fully enforced. In our opinion, the Bureau of Indian Affairs, Department of the Interior does not not have the personnel, the training, or the funding to insure the careful monitoring and control of Indian gaming operations. The type of control requires highly trained investigative personnel and a sophisticated law enforcement organization to back them up. Organized crime has repeatedly sought areas where large amounts of cash are involved. To insure basic protections against any intrusion of organized crim requires much more than the BIA has or could provide in the near future.

The third and final major problem associated with Indian gambling is the cost and operation of a National Indian Gambling Commission. How many trained agents, how many law enforcement personnel will be needed to oversee

Indian gambling in potentially over half the States in America? That will be no small chore. Presently, the Bureau of Indian Affairs and Tribal law enforcement on reservations is almost without exception woefully inadequate. Crime on the reservation has been a problem of staggering proportions without the addition of gambling to monitor. Without an adequate Indian law enforcement organization in place, the charge should be left to the States which, in most cases where gambling is permitted, have trained and effective law enforcement personnel.

Without allowing the States to have an active voice and role in gambling within their borders makes H.R. 1920 as it stands unacceptable. We understand that gambling can take place under current court decisions as they now stand. One should not react with a law that confirms these decisions in a way that is not good or acceptable to the vast majority of individuals who may wish to take part in Indian gambling activities.

RON MARLENEE.
LARRY E. CRAIG.
JAMES V. HANSEN.
DICK CHENEY.

APPELLEES' APPENDIX 2

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240
April 7, 1986

Dear Tribal Chairman:

I am writing to inform you that I have issued revised Guidelines for Review of Tribal Bingo Management Contracts and to urge you to submit your management contract for review if you presently have an unapproved contract. A copy of the revised Guidelines is enclosed.

Although the original Guidelines of July 20, 1984, provided that review would be at the option of the tribes, it is now the Department's policy to exercise its authority to review tribal bingo management contracts under 25 U.S.C. § 81 in all cases. As discussed in the revised Guidelines, the new policy was announced in the Secretary's letter of August 6, 1985, to the Governor of the Pueblo of Santa Ana.

If your tribe is conducting bingo under an unapproved bingo management contract, you are at risk that someone may file suit to have your contract declared null and void. 25 U.S.C. § 81 authorizes *anyone* to file suit in the name of the United States and, if successful, to recover half of any money paid to any person by or on behalf of the tribe. Although this old statutory provision has not been much used, a 1983 case demonstrates its potential for disrupting a tribal enterprise. In that case, an outdoor advertising company with an unapproved tribal contract was sued by the president of a rival company. Even though the district court considered the suit to be in reality an unfair competition dispute between the two companies, it held that

§ 81 was broad enough to render the tribal contract null and void. (The contract was approved while the case was pending on appeal so the issue became moot before the appeal was decided. *United States ex rel. Buxbom v. Naegele Outdoor Advertising Co.*, 739 F.2d 473 (9th Cir. 1984).) This case and the cases mentioned above show that § 81 is being invoked increasingly and that it can be used to the detriment of the contracting tribe.

For your own protection, therefore, you should submit your contract for review if you have not yet done so. Prior to submitting the contract, please review the revised Guidelines with your management company and attempt to bring your contract into conformity with the Guidelines.

Sincerely,

/s/ Ross Swimmer
Assistant Secretary—
Indian Affairs

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Memorandum

To: All Area Directors

From: Assistant Secretary—Indian Affairs

Subject: Review of Tribal Bingo Management Contracts

This memorandum replaces the memorandum of the Deputy Assistant Secretary—Indian Affairs (Operations) issued on July 20, 1984, and amended on April 9, 1985.

On August 6, 1985, the Secretary wrote to the Governor of the Pueblo of Santa Ana about the Pueblo's proposed pari-mutuel dog racing enterprise. In that letter, the Secretary stated that, "[U]nless and until the Congress identifies a more appropriate entity than this Department to review Indian gambling management contracts, it will be the policy of this Department to seek to exercise its authority under 25 U.S.C. § 81 (or under any other appropriate statute) to engage in such review, provided the contract at issue is within the scope of the statute." For purposes of these guidelines, all gambling management contracts of tribes or tribal enterprises should be presumed to fall within the scope of 25 U.S.C. § 81 (or 25 U.S.C. § 415, if a lease is involved).

The Secretary's policy statement recognizes both the fact that bingo management contracts present the potential for imposition upon the tribes and the fact the federal courts are continuing to hold that 25 U.S.C. § 81 makes tribal bingo management contracts null and void unless they are approved. The decision of the U.S. Court of Appeals for the Seventh Circuit in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985),

which held that an unapproved contract was void, was discussed in the Secretary's letter. A more recent decision which reached the same conclusion is *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200 (D. Minn. 1985).

I will be writing to the tribes to request that they submit their management contracts for review if they have not yet done so. You should also encourage the tribes in your Area which have unapproved contracts to submit them for review. If feasible, you should offer to assist them in renegotiating the contracts to bring them into conformity with the guidelines.

It is my intention that these guidelines will be applied in reviewing all contracts submitted after August 6, 1985, but not yet approved, regardless of the date of the contract.

Management contracts for bingo will continue to be reviewed at the Area level pursuant to the guidelines below.

Until further notice, the following guidelines should be observed in reviewing tribal bingo management contracts.

1. Authority to approve or disapprove tribal contracts may not be delegated to the Superintendents. 10 BIAM 3.5A. Accordingly, tribal bingo management contracts may be acted on only at the Area level or above. However, the Superintendents should participate in the review process and offer their recommendations to the Area Directors.

2. The contract or an accompanying resolution must set forth the scope of authority of the tribal officials who have signed the contract on behalf of the tribe* and identify the provision of the tribal organic document which authorizes the contract.

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* All provisions followed by asterisks are statutory requirements contained in 25 U.S.C. § 81.

3. The contract must set forth (1) the time and place where it was made, (2) the purpose for which it was made, and (3) the thing or things to be done under it.*

4. The contract must have a fixed limited time to run, which must be distinctly stated.* The contract term should not exceed five years unless there is provision for renegotiation of the management fee or other adjustment of the fee to accommodate changes in circumstances. For contracts of longer than five years duration, the opportunity for renegotiation or other provision for adjustment should arise no later than five years after the contract is entered and thereafter at intervals of no longer than five years.

5. The contract must include the amount or rate per centum of the contractor's fee.* It should also specify the method of computing the fee.

6. The contract must specifically set forth any contingent matter or condition which constitutes a part of the contract.* The contract should state that it represents the entire agreement of the parties.

7. The contract should state that no payments have been made and provide that no payments will be made to any elected member of the tribal government or relative[1] of any elected member of the tribal government for the purpose of obtaining or maintaining the contract or any other privilege for the contractor.

8. The contract must include or have attached a list of all parties in interest to the contract* including, on behalf of the contractor, all investors, including general and limited

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[1] For purposes of these guidelines, "relative" means an individual who is related to an elected member of the tribal government as a father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

partners, all corporate officers and directors, all stockholders of a corporation, and all employees who will have day-to-day management responsibility for the gambling operation. The list must include the residence* and business addresses, occupations*, dates of birth and social security numbers of all such persons. If the contractor is a corporation, its articles of incorporation and the corporate resolution authorizing the contract should also be attached. Additional information, such as resumes of individuals or information on lenders, may be requested if you believe it will assist you in evaluating he contract.

9. The contract should state that no party in interest, as defined in paragraph 8, is an elected member of the tribal government or a relative of an elected member of the tribal government. The contract should provide that the contractor will require any party in interest who is elected to the tribal government or whose relative is elected to the tribal government to divest himself or herself of his or her interest in the contract.

10. The contract should specifically state whether assignments or subcontracts[2] will be permitted. If they are permitted, the contract should provide that no assignment or subcontract is valid until approved by the Secretary or his authorized representative in the BIA. Assignments or subcontracts submitted for approval should include or have attached a list of all parties in interest as defined in paragraph 8 above, including addresses, occupations, dates of birth and social security numbers.

12. Before any contract is approved, the names of persons submitted pursuant to paragraphs 8 and 11 should be transmitted to the FBI for name and record checks. All

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[2] "Subcontract" means any contractual arrangement between the contractor and a third party wherein the third party will have any responsibility for the gambling operation or access to the proceeds of the operation.

such names and results of the FBI checks should be sent to the Chief, Division of Law Enforcement Services, who will maintain a control file of this information. No contract, assignment, or subcontract should be approved where the FBI report shows a felony conviction or plea of nolo contendere for any such person. If the FBI report shows an indictment for any such person, the tribe should be so advised.

13. The contract should require the contractor to furnish the tribe, on at least a monthly basis, statements showing revenues and expenses of the gambling operation and should provide that an independent audit by a certified public accountant acceptable to the tribe will be performed at least annually.

14. The contract should provide that the tribe will receive its portion of the proceeds of the gambling operation on at least a monthly basis. The contract should specify the tribal official or bank account to whom the tribe's portion of the proceeds should be paid and such provision should be consistent with the tribe's constitution and bylaws.

15. The contract should set out the accounting procedures to be used and should provide that the contractor's books of account will be maintained, and its financial statements prepared, in accordance with generally accepted accounting principles.

16. The contract should provide that the tribe has the right to inspect the contractor's books at all reasonable times, such as during normal business hours, and should explicitly recognize the right of the tribe at any time to secure an independent audit of the contractor's accounts.

17. The contract should specifically identify those expenses which constitute operating expenses and provide a method, requiring concurrence by the tribe, for determining the allowability of non-enumerated expenses as operating expenses.

18. The contract should require the establishment of a cash management system adequate to safeguard the funds of the operation and should provide that the tribe will have the right to oversee the system.

19. The contract should have a provision for dispute resolution short of litigation, preferably through a private procedure, such as arbitration.

20. The contract should clearly set out the grounds and procedures for termination of the contract. Breach of contract should be a ground for termination.

21. The tribe should have a valid ordinance authorizing and regulating the gambling activity to be conducted pursuant to the contract, and the contract should state that the gambling operation will be conducted in accordance with the tribal ordinance.

22. The contract should identify the party responsible for employment and personnel matters. A provision for Indian preference is desirable.

23. The contract should be consistent with any related lease of trust land. If no related lease is submitted, the management contract should be examined to determine whether the relationship between the parties, as described in the contract, will require a lease. If it will, the tribe should be so advised.

24. The contract should provide that the contractor will not interfere with or attempt to influence internal affairs or governmental decisions of the tribe.

25. If existing provisions for law enforcement and fire protection are not adequate for the proposed enterprise, the contract should specify how these services will be provided.

26. Compliance with the National Environmental Policy Act is required before a bingo management contract (or related lease) is approved.

27. The contract should be reviewed for legal sufficiency by the Regional or Field Solicitor's Office. This is no substitute for review by Bureau officials under these guidelines, however.

28. If your opinion, after review of a contract, is that the contract may not be in the best economic interest of the tribe, you should advise the tribe of your opinion and the reasons for it. However, if the tribe still wishes to proceed with the contract, and it appears that the tribe has entered into it at arms length and after careful consideration, the tribe's business judgment should be respected, and the contract should not be disapproved solely on the grounds that the tribe may have been able to make a better bargain. On the other hand, where it appears from the contract itself or from surrounding circumstances that the tribe has made a particularly unwise business decision or has been subjected to outside pressure, the contract should not be approved. To assist you in this assessment, you may wish to ask the tribe to submit a narrative describing how the contractor was selected and how the contract negotiations were conducted.

29. If contract modifications sufficient to bring the contract into conformity with these instructions cannot be accomplished, the contract should be disapproved. If the contract is disapproved, the tribe should be informed in writing of the reasons for disapproval.

30. Generally, the Superintendent should, within seven (7) working days of a tribal request to review a gambling management contract, transmit the documents submitted for review and approval to the Area Director. The Area Director should, within three (3) working days, send an acknowledgment of receipt of the documents to the tribe and the contractor. A final decision concerning the contract should be made as soon as possible, and not later than thirty (30) working days after the contract docu-

ments, the FBI reports, and Solicitor's advice are received and after it is clear that no further modifications of the contract will be made. A file should be maintained on the contract which is adequate to show the reasons for approval or disapproval of the contract.

31. Appeals from an Area Director's decision may be made pursuant to 25 CFR Part 2.

Ross Swimmer